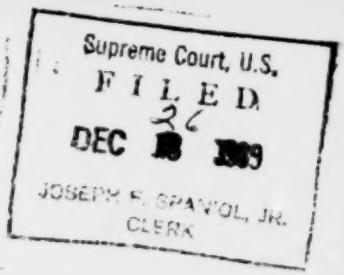
89-1040



NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT S. CHAPPELL
Petitioner,

-V-

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Robert S. Chappell
Reg. No. 00841-028
P.O. Box 1000 Unit-C
Sandstone, MN 55072

QUESTIONS PRESENTED

Whether sufficient cause was demonstrated by trial counsel's total abandonment of loyalty and the resultant chicanery to preclude the necessity for the showing of either further cause or prejudice to overcome further procedural bars even at the appellate level.

Whether the court of appeals erred, as a matter of law, and denied the defendant due process of law, when affirming the district court's procedural bar to reaching the merits of a Section 2255 post conviction motion for reason that a claim of ineffective assistance of trial counsel must be raised on first instance of direct appeal.

Whether unnecessary, and even planned, deliberate delays may be tantamount to a suspension of the writ of Habeas Corpus in violation of Article I, Section 9, Clause (2) of the U. S. Constitution since Title 28 USCA 2255 is the only means for reaching the constitutional issue of ineffective assistance of trial counsel or other constitutional issues which occurred at the trial level in the District Court.

Whether a procedural rule can be so strictly construed that it denies the prisoner the right to reach the constitutional issue of deliberate denial of a fair trial to serve political and third party interest by total abandonment of loyalty and counsel becoming an aggressive opponent of his own client where the procedural bar serves only to cover-up the chicanery of the trial counsel who was also the lead counsel on appeal wherein the court negates the intent and purpose of title 28 USCA 2255 by, without hearing, insisting, that regardless of the fact that the integrity of the trial process was grossly and totally undermined, and the result of the trial purposefully directed and affected, the issues cannot be addressed because partially different counsel was employed on appeal by wrongfully insisting that it is a well-established fact that ineffective assistance of counsel must be raised on direct appeal when in fact there is a difference of opinion among the circuits as well as conflicts with previous Supreme Court rulings and the appellate court

of its own volition, without evidence, abuses its discretion in wrongly concluding that different counsel was utilized on appeal which is beyond the finding of the District Court and the government's argument.

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PRAYER

The petitioner, Robert S. Chappell, pro se, respectfully prays that a Writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS

The Opinion of the Seventh Circuit is an opinion marked "Not For Publication" and is attached as Appendix A. The opinion and order of the United States District Court for the Southern Half of Indiana, Indianapolis Division is attached as Appendix C. The petitioner's brief and petition for rehearing with suggestion for rehearing en banc de novo, is attached as Appendix B. The Seventh Circuit denial of petition for rehearing with suggestion for rehearing en banc is attached along with petitioners brief as Appendix B.

JURISDICTION

Petition For Rehearing with suggestion for transfer to court en banc was denied by order issued on Spetember 25, 1989, by the Seventh Circuit Court of Appeals, which petition pertained to the affirmance, on June 2, 1989, of an opinion and order, issued on September 9, 1988, pertaining to a Petition For Writ of Habeas Corpus and Title 28 U.S.C.A. § 2255 Motion which was filed in the United States District Court for the Southern Half of Indiana, Indianapolis Division, on April 17, 1987, and pertained to a conviction under Title 18 U.S.C.A. § 1341, in 1980.

The jurisdiction of this court is invoked under Title 28 U.S.C. § 1254(1). This petition is filed within ninety (90) days after September 25, 1989, which is the date of the order denying the Motion for Rehearing. The Motion for Rehearing was timely filed on June 23, 1989.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 9, (2) of the U.S. Constitution states as follows:

> The privilege of the writ of habeas corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the U.S. Constitution provides in part as follows:

> ...nor be deprived of life, liberty, or property, without due process of law;

The Sixth Amendment to the U.S. Constitution states the following in part:

> ...to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

During the early stages of the energy crisis, the petitioner filed an offering with the Oil and Gas Division of the Securities Exchange Commission in Washington, D.C. for the development of a 150 acre oil and gas lease in Warren County, Pennsylvania. Ten wells with oil and gas potential were drilled, and the lease was being properly and timely developed considering the increasing prices of oil and gas.

In order to prevent the petitioner from contacting investors in Indiana a group of bankruptcy racketeers carefully planned the scenario for causing the S.E.C. to seek an injunction against the petitioner.

An injunction was signed with two understandings: 1. The petitioner could finish the project, 2. There would be no further litigation which the S.E.C. official threatened if the petitioner did not sign the injunction.

Approximately eight months later the S.E.C., at the behest of the same conspirators, returned seeking receivership and a second injunction.

The petitioner decided to leave the country and moved to Nassau, Bahamas on August 5, 1977. The S.E.C. kept half of its earlier promise of no further litigation; however, the post office was solicited to bring charges.

On July 19, 1979 an indictment was issued based upon near nonsensical statements.

The indictment contained 15 counts of mail fraud. Four counts were dropped. Nine counts resulted in acquittal. The petitioner was convicted on the latter two counts for which no defense at all was presented on November 19, 1981. The conviction could only have occurred by attorney Bradford becoming or being a deceitful opponent of his own client.

The earlier counts for which the petitioner was acquitted involved a letter written in 1975 and the latter two counts involved a letter written on April 14, 1977. In spite of the fact that the petitioner pleaded with counsel to explain that there was only one alleged conspiracy and the petitioner was either guilty of all of the charges or

else none of them, counsel cleverly allowed the prosecutors to divide the conspiracy into two conspiracies. The jury sent out a note questioning the judge regarding that point. The chicanery, dirty politics, and horrible acts of counsel and others are detailed in Appendix D.

Even though Petitioner was dissatisfied, hurt, and angry with trial counsel's chicanery and dirty tricks, he felt dependent upon Bradford, who was reciting all of the sure issues for appeal. The petitioner however, did hire Donald A. Tabbert and Richard Darko to assist in making the appeal. It was those issues which Attorney Bradford recited which were discussed at the only meeting with Bradford and the two assistants. Ineffective assistance of counsel as an issue for appeal was totally unknown to the petitioner. Whether or not it was considered or looked for by the assistant appellate counsel is unknown. It is further unknown if the entire record was studied by the assistants. However, it is highly doubtful that the associates in the appeal would have considered charging each other with ineffective assistance of counsel.

In February of 1983 the conviction was affirmed and Certiorari denied.

On April 17, 1987, a Title 28 USCA § 2255 motion was filed under number IP-87414C and is the subject of this appeal.

After a petition to the Seventh Circuit Court of Appeals for a Writ of Mandamus the district court acted upon the 2255 motion by denying relief on the grounds that petitioner had failed to allege what should have been obvious: Ineffective assistance of appellate counsel. Thus, finality claims and procedural bar were utilized under the cause and prejudice standard to shield the court and counsel from fault and the Constitutional issues of the Fifth and Sixth Amendments were ignored in total disregard for their horrendous harm and prejudice to the defendant.

Discovery and Hearing were denied to the petitioner.

On June 2, 1989 the Seventh Circuit Court of Appeals denied relief by affirming the judgement of the lower

court, with a, brief, not for publication opinion.

Petitioner requested a reconsideration with suggestion for an en banc, de novo, review. Both requests were denied on September 25, 1989. The Seventh Circuit Court of Appeals went even further and determined that different counsel was utilized on appeal, which cleared the way and perhaps encouraged seeking relief based upon ineffective assistance of appellate counsel in the district court where another petition has been filed seeking relief per U.S. ex rel Barnard v. Lane 819 F 2d 798 (7th Cir. 1987).

REASONS FOR GRANTING OF WRIT

The petitioner argued in his court ordered brief on cause and prejudice that no further showing of either cause or prejudice was required; because the specific act of counsel which include; the abandonment of loyalty, the service of third party interest, his becoming an opponent and adversary to his client and deliberately through all manner of chicanery, turned the trial process into a farce and a mockery of justice, and because of the joining in of the farcical trial process by the trial judge and the prosecutors. Therefore, further showing at district court or at the appellate level was not required.

- The petitioner relied upon the following cases: U.S. v. Harrison P. Cronic 466 U.S. 648, 104 S. Ct. 2039: "A Sixth Amendment claim may be justifiably sustained by the surrounding circumstances of the trial."

Strickland v. Washington 466 U.S. 668:

"Since fundamental fairness is the central concern of the writ of habeas corpus no special standards ought to apply to ineffectiveness claims made in habeas pleadings," [126].

Whiteside v. Scurr, 744 F 2d 1323, 1330 (8th Cir 1984):

"A conflict of interest may not necessarily involve multiple representation, but breach of counsel's duty of loyalty necessarily constitute conflict of interest, citing Strickland v. Washington and U.S. v. Harrison P. Cronic 80 L. Ed. 2d 657 (1984) and further "Conflict of interest necessarily implicates breach of counsel's duty of loyalty, which is perhaps the most basic of counsel's duties and in essence no further showing of prejudice is necessary or required."

No further showing of prejudices would lead one to believe that would also include at the appellate level. Cause for the procedural default should be self-evident if such a breach of loyalty was not appealed by appellate counsel. Please see Appendix D and Appendix E.

Criminal defendants whose right to appeal has been frustrated should be treated exactly like any other appellant's; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings, Rodriquez v. U.S. Cal. 1969 23 L Ed 2d 340.

Petitioner Chappell was denied due process of law by the abandonment of loyalty by his attorney to serve self-interest and the interest of third parties. Appendix D sets out the allegations of grossly ineffective assistance of counsel which caused the trial to be a farce in which no one could have confidence in the outcome.

The petitioner has been denied the right to reach those issues recited in Appendix D. In the first instance by the district court in its conclusion that it is a well-established fact that cause must be established for failure to raise the issue of ineffective assistance of counsel at the appellate level before the constitutional issue may be raised on a 28 U.S.C.A. § 2255 motion and Petition for Habeas Corpus. The district court found that partially different counsel had been used on appeal; thus, the petitioner was barred from raising that constitutional issue.

The Seventh Circuit Court of Appeals went even further and found contrary to the facts that different counsel had been utilized on appeal and affirmed the district court's decision.

There is much confusion among the circuits on the issue of how and when ineffective assistance claims can or should be raised.

"Claims of ineffective assistance of counsel generally are limited to collateral review and ordinarily will not be considered on direct appeal," U.S. v. Gambino, 788 F. 2d 938, 949-50 (CA3), cert. denied, 107 S. Ct. 98 (1986). In the courts words " A litany of cases in this circuit firmly establish our general policy against entertaining ineffective assistance of counsel claims on direct appeal." page 980.

Brian v. U.S. 695 F 2d 10 (Ca 91 1972) and U.S. v. Baynes, 687 F 2d 659 (CA3 1982) say that the cause and prejudice standard does not apply to 2255 motions raising claim of ineffective assistance of counsel for the first time.

In Murray v. Carrier, 477 U.S. 478, the Supreme Court held that "attorney error, unless it amounts to ineffective assistance of counsel in violation of the Sixth Amend-

ment does not constitute cause for a procedural default under the rule of Wrainwright v. Sykes even when the default occurs on appeal rather than at trial," 2. that "cause for a procedural default ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim at issue".

In Murray v. Carrier there are conflicts in both 1. and 2. in the following: 1. It cannot be determined if a claim amounts to a constitutional violation if the issue is barred by a procedural default, discovery is denied, and no hearing is held; and 2. It cannot be determined if there is sufficient external impediment preventing counsel from constructing or raising the claim at issue on appeal without evidence and without a hearing.

WRIT SUSPENDED

The petitioner maintains that another constitutional violation of equal magnitude has occurred in the instant case. Congress and the courts through the use of Title 28 U.S.C.A. § 2555, in this case, have in violation of Article I, Section 9 (2) suspended the privilege of the writ of habeas corpus.

"The privilege of the writ of habeas corpus shall not be suspended unless when in cases of rebellion or invasion the public safety may require it, Powers Forbidden to Congress Article I, Section 9(2).

Since petitioner's incarceration December 9, 1986, he has been barred from the privilege or right to the availability of habeas corpus as a remedy for his erroneous conviction by having to exhaust the Title 28 U.S.C.A. § 2255 procedure through the court system. This amounts to a suspension.

"Congress had power to vary procedures under Title 28 U.S.C.A. § 2255 dealing with motion to vacate sentence and habeas corpus so long as essentials of due process were preserved. Stirone v. Markley, C.A. Ind. 1965, 345 F 2d 473, cert. denied 865. Ct. 67, 382 U.S. 829, 15 L. Ed 2d 73.

Even though habeas corpus continues to be a remedy when 28 § 2255 is shown to be inadequate or ineffective, another bar or barrier is placed in the petitioner's path

which he must overcome - he must show inadequacy or ineffectiveness, Id.

Would the essentials of due process not at a minimum include, those steps set out in 2255 which include discovery, witnesses, and a hearing? Please also see Martin v. Hiatt, C.A. Eq. 1949, 174 F 2d 350.

As applied by the district court the remedy under 2255 was both inadequate and ineffective to test the legality of petitioner's detention. U.S. v. Anselmi C.A. Pa. 1953 207 F 2d 312, cert. denied 74 S. Ct. 430, 347 U.S. 902.

"Section 2255 authorizing motion to vacate sentence is the complete statutory equivalent of habeas corpus for federal prisoners and may not be limited without violating U.S.C.A. Const. Article I, § 9 cl. 2,"U.S. v. Brown, D.C. Pa. 1976 417 F. Supp, 340. Does the cause and prejudice standard not limit it?

"Criminal defendants whose right to appeal has been frustated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings, Rodriquez v. U.S. Cal 1969, 89 S. Ct 1715, 23L Ed. 2d. 340. Can the same not be said of any constitutional violation? Should an additional hurdle to clear be given to a criminal defendant whose fundamental constitutional right to effective assistance of counsel was grossly and deliberately denied in trial at the district court level?

As the court stated at the conclusion of the trial, "You should have had a good attorney." But Sir! They are not listed that way in the yellow pages!

WRIT IMPAIRED BY CAUSE AND PREJUDICE STANDARD

The Writ of Habeas Corpus coupled with 18 U.S.C.A. § 2255 under the cause and prejudice standard doesn't appear to be a great writ at all.

"Writ of habeas corpus is an extraordinary remedy which is not bound by thongs of technical pleading, nor is its relief hindered by captious objection or fine spun theories of procedure." Jung Woon Kay v. Carr, C.C.A. Cal 1937, 88 F 2d 297. Does 28 U.S.C.A. § 2255 and the cause and prejudice standard bind it by thongs of technical pleading? Is its relief not hindered by captious objections and fine spun theories of procedure such as "procedural bar at the appellate level?"

"Habeas Corpus is not now and never has been a static narrow, formalistic remedy; its scope has grown to achieve its grand purpose-the protection of individuals against erosion of their right to be free from wrongful restraint upon their liberty." Hammond v. Lenfest, C.A. Conn. 1968, 398 F 2d 705.

"There is no higher duty than to maintain writ of habeas corpus unimpaired." Johnson v. Avery, Tenn. 1969, 89 S. Ct 747, 393 U.S. 483, 21 L. Ed 2d 718.

"Function of writ of habeas corpus is to provide applicant with a prompt remedy." Morgan v. State of Tenn. D.C. Tenn. 1969, 298 F. Supp 587.

"This chapter, relating to habeas corpus, is designed to minimize rigid formality and is the liberal reflection of the judiciary in permitting those persons who contend they are illegally detained to have their day in court." U.S. ex rel. Montgomery v. Ragen, D.C. Ill. 1949, 86 F. Supp. 382.

Has the petitioner not been denied his day in court by a procedural bar under the cause and prejudice standard for three years which would be tantamount to a suspension of the writ of habeas corpus for that period of time?

"Purpose of writ of habeas corpus is to provide a prompt and efficacious remedy for whatever society

deems to be intolerable restraints. Bland v. Rogers, D.C. D.C. 1971, 332 F. Supp 989.

Society surely cannot condone the conviction of an innocent person for a non-existant crime on charges which could have been brought only by giving false and/or misleading information to a grand jury and by all manner of chicanery by judge, prosecutors, and petitioner's own lawyer who was so obsessed with obtaining the opportunity to overturn the elderly judge that he would stop at nothing to cause a conviction when any competent attorney doing only what could be expected of him such as interviewing and presenting witnesses and preparing a defense could have as easily obtained an acquittal on the latter two counts as was demonstrated by the petitioner's forced defense on the earlier nine counts by causing the presence of two witnesses. Even without additional witnesses, all that would have been required for an aquittal would have been to explain that only one conspiracy was alleged (a question raised by note from the jury later) as the petitioner begged the disloyal attorney to do, instead of encouraging the division into two conspiracies by just sitting and staring grinningly at the judge as the prosecutor hammered away for conviction on the latter two counts for which no defense had been presented. It was an indictment which should never have been brought.

It was reported to the petitioner that the prosecutor did not want to put the petitioner in jail but "only to exercise some control over him for a couple of years." This was to prevent the petitioner from exposing receivership racketeering in the District Court of the Indianapolis Division.

"The writ of habeas corpus is a high prerogative writ, known to the common law, the great object of which is the liberation of those who may be imprisoned without sufficient cause. It is in the nature of a writ of error, to examine the legality of the committment." Ex parte Watkins, Dist. Col. 1830, 28 U.S. 193, 3 Pet. 193, 7 L. ED 650.

The court, the U.S. Attorney, and the postal inspector have failed to cause a copy of the innocent inoccuous letter which was described as a "lull letter" to be delivered to the petitioner for inclusion herewith. It was alleged in the indictment that the checks for payment of the investors proportionate share of the oil produced, saved, and sold was a few pennies in excess of the correct amount. The government admitted that they were "wrong about that." The letter stated that the company had decided "not to sell the project" because of the probability of an increase in the prices for both oil and natural gas. The price of oil did increase to $40.00 per barrel. The price for natural gas did increase to $7.00 per M.C.F. The wells were capable of producing gas and permission for a tap in a high pressure pipeline had been obtained. It would have been foolish and incompetent to have produced oil at a faster rate and to have wasted more scarce high priced natural gas by accellerated production of oil. The letter did not say that " a sale for the project was imminent," which statement if made might be considered to be a "lull letter." The trial was not only a farce and a mockery of justice in violation of due process but it was also "down right dirty," with all manner of lies and chicanery.

Has the writ of habeas corpus been available to the petitioner? It appears to have been suspended by petitioner being forced into the same court where the "dirt was done" for relief, by the application of the cause and prejudice standard and by a denial of due process by delays, passing the case from Democrat to Republican and back and forth again and again and thus once more a denial of due process. Where is the "Great Writ"? Was it either adequate, effective, or availabe? Or, has an effective shield to the Great Writ been devised by the

Indianapolis Division District Court?

It is totally illogical that there could be ineffective assistance of counsel at the district court level and to bar without a hearing the issue from being raised at a latter time because appellate counsel failed to raise the issue at the Appellate Level. It would be, obviously, ineffective assistance of appellate counsel not to have raised the issue. Such a question should not require an argument, the answer is self evident.

The district court found cause and in essence ineffective assistance by counsel at that level yet "hung its hat" on the appellate counsel. The appellant did not get a fair trial for the non-existant crime.

If a fair trial is denied one accused of crime there is no way to address that issue under the procedure required by the district court. The court has in essence said regardless of the gross chicanery of counsel-even if it amounted to abandonment of loyalty which requires no further showing of prejudice per Stickland v. Washington, and even if the issues amount to a clear violation of the Sixth Amendment there is no way to address the issue because the appellate counsel was likewise ineffective in that they failed to raise ineffective assistance of counsel on appeal and thus a second constitutional violation occurred and the second one makes the first alright. Can two wrongs make a right? It seems that both wrongs would still equal a Sixth Amendment violation of due process.

In the instant case the chief trial counsel was also one of the three appellate counsel but the district court made that a negative in its finding that partially different counsel was used on appeal and the appellate court went further and decided that different counsel was utilized on appeal. This was all accomplished by the district and appellate courts without discovery, hearing, and evidence. It was simply easy to hide and ignore the facts by placing the shield of procedural bar in front of the Constitutional issue.

Is the Third Circuit right in not entertaining ineffective assistance claims on direct appeal, or are the First and

Third Circuits right in that the cause and prejudice standard should not apply to cases raising ineffective assistance claims for the first time, or is the Seventh Circuit right in that the only way to raise ineffective assistance claims is on direct appeal regardless of the gravity of the Constitutional violation.

With the decision in U.S. ex rel Barnard v. Lane, 819 F. 2d (7th Cr 1987) the Seventh Circuit has recognized the fact that if there is ineffective assistance of counsel, appellate counsel is likewise ineffective if the ineffective assistance is not recognized and appealed by appellate counsel. This procedure might have the same net effect or end result but it places one more barrier in the path of the Great Writ, thus effectively delaying or suspending it while the convicted one is wrongly incarcerated: the condition which the writ is intended to prevent. Admittedly, the Seventh Circuits solution would be to allege both ineffective assistance of trial counsel (for his errors) and ineffective assistance of appellate counsel for failing to raise ineffective assistance of counsel on appeal.

The above issues should be addressed by the Supreme Court. The writ of certorioria should issue.

At a time when attorneys at the rate of 30,000 per year are being pumped into the job market, and when former Chief Justice Warren Berger has said that he believes "as many as fifty percent of U.S. trial lawyers are imcompetent", and when Chesterfield Smith, former head of the American Bar Association has said that "he would not trust 25% of all lawyers", it is wrong to allow ineffective assistance of counsel of the magnitude as shown in this case to be shielded and passed over. The variety of offence to a basic constitutional right demonstrated in the instant case should be a serious crime when deliberately planned and cleverly executed in revenge for the barring of a law partner from the court.

There is an assumption that a defendant is entitled to a confliict free tribunal. The judge (Steckler) in this case knew that just having James Bradford the "fair haired boy" of Judge Cole Holder in his courtroom presented a potential conflict especially after Philip Melangton, the

law partner of Bradford, was prohibited from practicing in Steckler's court.

The judge was not without fault. He should have questioned and informed the defendant of potential conflicts, Burger v. Kemp (1987) cite omitted.

Claims under Title 28 USC § 2255 are frustrated by differing opinions among the circuits and differing methods of applying the decisions of this court. The Ninth Circuit, in a decision only one month prior to the appellate decision in the instant case, followed Strickland v. Washington in U.S. v. Burrows, 872 F. 2d 915 (9th Cir 1989).

There is great conflict between the First, Third, and Seventh Circuits in that the First and Third say that the cause and prejudice standard does not apply to cases raising ineffective assistance claims for the first time. The Seventh says that it does apply. The Third Circuit says claims of ineffective assistance of counsel cannot be raised on direct appeal. The Seventh Circuit says they must be or else they meet great resistance and many hurdles under 28 USCA § 2255.

The writ of certiorori should be granted because much injustice has resulted from the confusion and interpretation of this courts intent. The instant case has been infected with a fatal irregularity rendering the decisions unjust and unfair contrary to the intent of this court or the U.S. Constitution.

"The writ of habeas corpus and its brother remedy under this section providing for motion to vacate sentence are means of vindicating constitutional and statutory rights and their use in the service of free men under constitutional government must not be diluted," Diaz v. U.S. D.C. La 1967, 391 F 2d 932.

. "Conventional notions of finality in criminal litigation cannot be permitted to defeat manifest federal policy that federal constitutional rights of personal liberty shall not be denied without fullest opportunity for plenary federal judicial review." Kaufman v. U.S. Mo 1969 89 S. Ct. 1068. This problem has been around for a long time.

Dec. 20, 1989, Robert L. Chapman, Jr.

APPENDIX A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinios 60604
Submitted May 18, 1989*
June 2, 1989

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

Robert S. Chappell,
Petitioner-Appellant,
vs.
UNITED STATES OF AMERICA,
Respondent-Appellee.

No. 88-2898
Appeal from the United States District Court for the Southern District of Indiana Indianapolis Division
87 C 414
Larry J. McKinney, Judge

ORDER

Robert S. Chappell was convicted of two counts of mail fraud in violation of 18 U.S.C. § 1341. This court affirmed his conviction on direct appeal. United States v. Chappell, 698 F. 2d 308 (7th Cir. 1983). Chappell then brought a motion in the district court to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. The district court denied Chappell's motion on the grounds that Chappell failed to present sufficient explanation for not raising in his direct appeal those issues which he now raises in his section 2255 motion. We affirm.

* After a preliminary examination of the briefs, the court notified the parties that it had tentatively concluded

that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34 (a), Fed. R. Civ. P.; Circuit Rule 34(f). No such statement having been filed, the appeal has been submitted on the briefs and the record.

It is now well established that a federal prisoner's failure to raise a constitutional issue on direct appeal bars raising that issue in a subsequent section 2255 motion, unless the prisoner can show cause for the actual prejudice resulting from the error of which he complains. United States v. Kovic, 830 F. 2d 680, 683 (7th Cir. 1987); Norris v. United States, 687 F. 2d 899, 904 (7th Cir. 1982). None of the four issues raised in Chappell's section 2255 were raised on direct appeal; Chappell is, therefore, barred from seeking habeas relief on these issues unless he demonstrates both cause and prejudice.

Chappell argues that he established cause in the district court by alleging that his trial counsel was ineffective. But as the district court noted, this does not sufficiently explain why Chappell, who was represented by different counsel on appeal, was precluded from raising these issues on appeal. Unless appellate counsel was similarly ineffective, and Chappell does not claim that counsel was, the alleged ineffectiveness of Chappell's trial counsel is insufficient to establish cause for Chappell's failure to raise these issues on appeal. Cf. United States ex rel. Barnard v. Lane, 819 F. 2d 798, 802 (7th Cir. 1987).

Chappell's failure to establish cause forecloses need for further inquiry into whether he could establish prejudice. The district court properly ruled that Chappell failed to overcome his procedural default; the judgment of the district court is AFFIRMED.

1 In appropriate cases, the principles of comity and finality that require the cause and prejudice standard must yield where evidence suggests that a fundamental miscarriage of justice might otherwise result, such as the conviction of an innocent person. Murrary v. Carrier,

106 S. Ct. 2639, 2650 (1986). Chappell does not argue this is an appropriate case, and no evidence would support such a claim.

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
September 25, 1989

Before
Hon. Harlington Wood, Jr., Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge

Robert S. Chappell,
Petitioner-Appellant

vs.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. Larry J. McKinney, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by petitioner-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly, IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH COURT

ROBERT S. CHAPPELL,
APPELLANT,
v.
UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court, Southern District of Indiana, Indianapolis Division

Appeal Number: 88-2898

District Court Number: IP 87-414 C

APPELLANT'S PETITION FOR REHEARING OR, IN THE ALTERNATIVE, TO TRANSFER TO COURT EN BANC IN CIRCUIT COURT OF APPEALS

Comes now ROBERT S. CHAPPELL, pro se, the appellant, to petition the Court for a reconsideration of the order issued on June 2, 1989, which affirmed the judgement of the District Court, and in the alternative to transfer to Court En Banc in Circuit Court of Appeals, pursuant to Federal Rules of Appellate Procedure 35 and 40(a), for the reasons as herinafter stated.

APPELLATE COUNSEL AND TRIAL COUNSEL THE SAME

The Court erred in determining that appellant had different counsel on appeal. He did not. James Bradford was the trial counsel and James Bradford was the appellate counsel. Donald Tabert and Richard Darko were assistants of James Bradford just as Anthony Carissi was an assistant to Bradford in the District Court Trial. Appellant has stated this from his first filing, Exhibit AA, page one of the hand written section, line 14 "aban-

doned all loyalty to the defendant in order to lose the trial, make an appeal, receive $15,000, serve self and third party interests." And at line 34 (same page) "failed to pay sufficient attention to the appeal brief so as to prevent misspelled words and less than adequate emphasis upon the hearsay nature of accountant Ricci's records and testimony."

Exhibit AB, on page two, shows that James Bradford was paid $35,000 for the trial and an additional $15,000 for the appeal. Donald A. Tabert and Richard Darko were paid a total of $10,000 in addition to James Bradford's $15,000 for their appellate assistance. Exhibit AB also shows, on page two, petitioner's belief that his trial counsel and appellate counsel were one and the same "...was to hire a licensed lawyer from whom he had a right to expect loyalty, honesty, effort, and fair representation." All of the exhibits filed by the appellant will indicate that Bradford was the one to whom the appellant relied upon, both in the trial and at the appellate level. Page five of the Reply Brief shows appellant's dependence upon Bradford.

EXTERNAL FACTORS AS CAUSE

The appellant's Reply Brief, page three, in caps, states "The Issues Raised In Appellant's 2255 Motion Could Not Have Been Raised On Direct Appeal." Page three further points out that Bradford was the trial counsel and the lead counsel in the appeal. Please read page three and four of the Reply Brief.

INNOCENCE OF APPELLANT

Page eight of the Reply Brief points out the innocence of the appellant. Innocence for a nonexistant crime has been maintained from the first accusation through arraignment, trial, appeal, and until the present. The section entitled "More Than Colorable Evidence of Innocence," commences on page 31 of Exhibit AD and continues through page 38. Each allegation is explained therein. There is no other evidence in this case other than the documents presented by the appellant. The appellant has argued that a fundmental miscarriage of justice has resulted. An innocent person has been convicted.

Appellant's brief, page eight, states "Exceptional circumstances are presented. The need for the remedy of habeas corpus is apparent."

FUNDAMENTAL FAIRNESS

The fundamental fairness of the appellant's conviction is at issue. It has been stated from the first filing that Attorney James Bradford's performance, acts, and actions were so deficient as to make out a Sixth Amendment claim of ineffective assistance of counsel. It is no minor incident when an attorney gives amphetemines to a client to lessen his impact upon the jury, abandons all loyalty and sacrifices an innocent dependent client for the political ends of third parties and in revenge for the barring of his law partner from practicing in the judge's court.

In Murray v. Carrier, 477 U.S. 478, the United States Supreme Court held "(1) that attorney error, unless it amounts to ineffective assistance of counsel in violation of the Sixth Amendment does not constitute cause for a procedural default under the rule of Wainright v. Sykes even when that default occurs on appeal rather than at trial, (2) that cause for a procedural default on appeal ordinarily requires a showing of some external impediment preventing counsel from constructing or raising the claim at issue."

CONFLICT

There is conflict in (1) in that there is no way to determine if attorney error amounted to a Sixth Amendment violation if the issue is barred even from being raised because of a procedural default at the appellate level. The appellant participated in the trial and he knows what happened there. Other than one meeting with Bradford after the trial, regarding the appeal, when Tabert was present and Darko was present for a portion of the time, the appellant did not know about it, nor was he informed by Bradford, or any other attorney of ineffective assistance of counsel as a basis for appeal. The appellant paid a law firm $25,000 just to find out about the existance of U.S.C.A. 2255, Rule 35 FRCP Motions, and ineffective assistance of counsel as a

basis for collaterally challenging the conviction of an innocent person.

People are not born knowing the law. They must learn it. And parts of the are learned out of necessity.

PRO SE STATUS

No consideration has been given to the appellant's pro se status (through necessity). The appellant is not gifted with the ability to write morally and spiritually uplifting legalese, which commands great respect for the law, such as was demonstrated in United States ex rel. Bernard v. Lane, 819 F. 2d 798, 802. However, he has conveyed the facts sufficiently to deserve a fair and factual consideration. In spite of repeated requests per Haines v. Kerner, 92 S. Ct. 594, regarding such pleadings, the appellant has been denied the right to prove the allegations made in the petition (Exhibit AA) which amount to a gross Sixth Amendment violation.

FINALITY CLAIMS

Per Strickland v. Washington, 466 U.S. 668, "a fair trial for the accused is the goal, a trial in which confidence can be placed in the outcome, whose result is reliable, so that the guilty are convicted and the innocent go free. An ineffective assistance claim asserts the abscence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower." The Pro Se appellant cannot be barred from presenting a Sixth Amendment Claim based on the different counsel theory without a hearing to determine if counsel was independent and different and if the two assistants checked the records for ineffective assistance which is highly unlikely!

METHOD OF DETERMINATION IMPROPER

The District Court erred in arbitrarily determining that different counsel handled the appeal than the original trial counsel. This determination was made without a hearing, without evidence, and without knowing whether the assistants were authorized to look for ineffective

assistance of counsel, whether they read the entire record and what influence attorney James Bradford had on their functions.

DISMISSAL WITHOUT HEARING

Citing Hanes v. Kerner, 92 S. Ct. 594, the appellant repeatedly requested discovery, a hearing, and in essence an opportunity to prove the allegations which the government did not contest. United States v. Burroughs, 872 F. 2d 915, which was decided on April 18, 1989, and followed the law as outlined in appellant's Exhibit AD and as recited by the United States Supreme Court in Strickland v. Washington, confirms the necessity for a hearing when the claim is based upon matters outside the record or events outside of the courtroom.

DE NOVO STANDARD

The appellant requested a de novo review of the denial of his Section 2255 motion. The Court did not review de novo even though as appellant pointed out that his claim of ineffective assistance of counsel is a mixed question of law and fact which should be reviewed de novo. U.S. v. Burroughs, confirms that opinion, 872, F. 2d 917, II(1). Neither procedural default as a bar nor finality claims must be permitted to sweep the harm and prejudice in this case into the dead injustice file.

DIVERSITY OF OPINION BETWEEN CIRCUITS

Just one month prior to the Seventh Circuit's ruling in this case, the Ninth Circuit made a ruling which was exactly opposite to that of the Seventh Circuit, and decided along the exact lines as set out in appellant's briefs.

The"brain drain"and midwest severity may account for a slight portion of the conflict; however, most of the reason or cause might be attributed to the politically motivated rubber stamping of the actions of the executive branch of government in a district which is noted for its harsh, severe, and "bloody" political practices by a partisan court which is constitutionally intended not only

to be separate in its powers, independent in its actions, above cheap petty politics, and capable of following the law rather than the whims of local U.S. prosecutors.

Attorney James Bradford attributed his failure or loss in U.S. v. Robert S. Chappell, 698 F. 2d 308, to the fact that Judge Cummings was a Democrat who had eulogized Judge William Steckler, a Democrat, at a banquet for his longevity. Should the concepts of a fair trial and equal protection of the law be placed above partisan politics?

It was politics in furtherance of receivership schemes and their cover up which caused the charges in the original case herein under challenge. It was political opportunism by James Bradford of the opposite party which caused the conviction in an indictment which any attorney, doing a nearly competent function of counsel and only what could be expected from any attorney, could have easily obtained an acquittal on the remaining two of the eleven counts. It was not only Judge Steckler who (as Bradford complained) was playing God, but Bradford did it also to an equal or greater extent to the detriment of his client.

The First and Third Circuits in Brien, 695 F. 2d 10, and Baynes, 687 F. 2d 659, respectively, have held that the cause and prejudice standard should not apply to cases raising ineffective assistance of counsel for the first time. It could not be determined whether or not a Constitutional violation had occurred if a defendant is barred, from raising the issue, by a procedural default. This logically will be the next ruling of the Supreme Court on this issue.

Strickland v. Washington, as well as United States v. Harrison P. Cronic, Whiteside v. Scurr, and Davis v. Alaska are in conflict with the Seventh Circuit's findings and ruling in the instant case.

CONCLUSION

The appellant, a former citizen of the United States by birth, has suffered for twenty-four years as a result of the politics as practiced in all aspects of government in the Southern half of the Seventh Circuit, Indianapolis Division, wherein political considerations must come first,

above all others, or else receivership followed by indictment occurs for any talented person who fails or refuses to buy political influence at the requested price.

Ten years of suffering has resulted from the instant case which has caused the loss of millions of dollars and even life plus the incarceration of an innocent person.

The appellant has done nothing in his business career which should have brought him near to a federal court, yet this court wrongfully wishes to force upon him a fraud conviction to bring additional harm for the balance of his life. Attorney James Bradford, by doing only what could be expected from any attorney, could have prevented this gross miscarriage of justice.

PRAYER

The appellant prays that this Court will partially undo the harm and prejudice suffered by the appellant and not force upon him the necessity to fight further in the Supreme Court or in any other way. Please, bring justice nunc pro tunc for a former citizen by reconsidering the issues contained in the appellant's filings, briefs, and exhibits and in the alternative to transfer to the court en banc.

Please, consider that the appellant was convicted by the "double hearsay" evidence of a deceased, unavailable, uncrossexamined person whose records, according to the attorney for the receiver were, to the effect, unintelligible and which had been in the custody of a deceased, unavailable receiver.

A de novo hearing en banc would be appropriate.

This Petition, For Rehearing or, In the Alternative, To Transfer To Court En Banc In Circuit Court of Appeals, is signed and dated this 23rd day of June, 1989 and

Respectfully Submitted,

by

Robert S. Chappell, Pro Se.

CERTIFICATE OF SERVICE

I hereby certify that copies of this Petition have been mailed by First Class United States Mail to the following:

(1) U.S. District Attorney, Southern Half of Seventh Circuit, Indianapolis Division, 46 East Ohio Street, Indianapolis, Indiana 46204, and (2) Federal District Judge Larry McKinney, Federal Building and U.S. Courthouse, 46 East Ohio Street, Indianapolis, Indiana 46204.

Dated this 23rd Day of June, 1989 at Sandstone, Minneaota

Robert S. Chappell

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT SAMUEL CHAPPELL
v.
UNITED STATES OF AMERICA

CAUSE NO. IP87-414-C

JUDGMENT

The Court having this day filed its Entry in the above matter in the following words and figures:

H.I.

now, therefore,

IT IS CONSIDERED AND ADJUDGED that petitioner take nothing by his complaint and this action is hereby dismissed with prejudice.

DATED this 9th day of September, 1988.

Larry J. McKinney
JUDGE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Copies to:

Robert S. Chappell, #00841-028
Federal Correctional Institution
Sandstone, MN 55072

United States Attorney
5th Floor, U.S. Courthouse
45 E. Ohio St.
Indianapolis IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT SAMUEL CHAPPELL
v.
UNITED STATES OF AMERICA

CAUSE NO. IP 87-414-C

ENTRY

This cause comes before the Court on petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255, the respondent's reponse, petitioner's reply, and petitioner's supplemental reply. The Court, having considered the foregoing and being duly advised, hereby denies petitioner's motion to vacate, set aside, or correct sentence.

The petitioner, Robert Samuel Chappell, was convicted on two counts of mail fraud in violation of 18 U.S.C. § 1341 following a jury trial in this Court. Thereafter, this Court sentenced petitioner to a three-year term of imprisonment and a consecutive four-year period of probation. Petitioner's conviction was affirmed on direct appeal by the Seventh Circuit Court of Appeals. United States v. Chappell, 698 F. 2d 308 (7th Cir. 1983). In hsi direct appeal, petitioner raised the following issues: (1) insufficient evidence to support the conviction, and (2) the improper admission of hearsay evidence.

On April 17, 1987, the petitioner filed a motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255. The petitioner raises a litany of alleged errors at trial, which petitioner claims constitutes the following: (1) Ineffective assistance of counsel; (2) Prosecutorial misconduct; (3) Judicial misconduct; and (4) Evidence not before heard.

On June 25, 1987, the respondent filed a response to petitioner's motion. The respondent correctly argues that the failure to raise these issues on direct appeal constitutes a procedural default that precludes review in a subsequent § 2255 motion unless the petitioner can establish cause and prejudice for the procedural default.

See United States v. Frady, 456 U.S. 152 (1982); United States v. Kovic, 830 F. 2d 680 (7th Cir. 1987); Norris v. United States, 687 F. 2d 899 (7th Cir. 1982). On July 28, 1987, the petitioner filed a reply. Upon review, this Court determined that petitioner's reply did not adequately respond to the respondent's contention. Recognizing, however, that petitioner was proceeding pro se, this Court concluded that petitioner should be afforded a realistic opportunity to address the issues of cause and prejudice. Consequently, this Court ordered the petitioner to file a supplemental reply addressing these issues. On May 9, 1988, the petitioner filed a rambling, thirty-nine (39) page supplemental response.

As the Court indicated in its entry March 30, 1988, [1]"a federal prisoner's failure to raise a constitutional issue on direct appeal bars raising it in a subsequent § 2255 motion. Unless the defendant can show cause for and actual prejudice resulting from the error of which he complained." Kovic, 830 F. 2d at 683. Furthermore, petitioner bears the burden of establishing cause and prejudice. In his supplemental reply, the petitioner asserts the same claims of ineffective assistance of counsel as a basis for establishing cause and prejudice as he urges in his petition. In support of his claim of ineffective assistance of counsel, petitioner recites a lengthy list of alleged errors committed by trial counsel. The petitioner, however, fails to recognize that the procedural default in this case occurred at the appellate level. In this Court's opinion, ineffective assistance of counsel as a basis for cause and prejudice in this situation must implicate ineffective assistance of appellate counsel, not trial counsel.

This Court recognizes that when an individual is represented by the same attorney at trial and on appeal, counsel may fail to raise a claim of ineffective assistance of counsel at trial for a variety of reasons. The record before

1 Similarly, "[n] on constitutional errors are not properly raised in a § 2255 motion because they could have been, but were not raised on direct appeal." Id. n. 8 (citations omitted).

this Court indicates that petitioner was represented at trial by Mr. James Bradford and Mr. Anthony Carissi. Moreover, petitioner appears to be indicating that Mr. Bradford was at least partially involved in prosecuting petitioner's direct appeal. The record, however, also indicates that petitioner retained the service of a second law firm on appeal, and in particular attorneys Donald Tabbert and Richard Darko. In the absence of some showing to the contrary by the petitioner, this Court will not presume that petitioner's co-appellate counsel abdicated their responsibility to adequately represent petitioner and failed to raise a viable claim of ineffective assistance of trial counsel. Furthermore, even if this Court were to assume that co-counsel on appeal were reluctant to raise this issue, this would not provide a basis for failing to raise such issues as prosecutorial misconduct, judicial misconduct, or[2] "evidence not before heard." In short, the petitioner has failed to establish any cause for his procedural default on appeal.

Accordingly, this Court denies petitioner's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255.

DATED this 9th day of September, 1988.

Larry J. McKinney
JUDGE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

Copies to:
Robert S. Chappell, #00841-028
Federal Correctional Institution
Sandstone, MN 55072

United States Attorney
5th Floor, U.S. Courthouse
46 E. Ohio St.
Indianapolis, IN 46204

2 Note that petitioner does not assert that this is newly discovered evidence. This is evidence that was known to counsel and to petitioner at trial but which counsel declined to offer, apparently as a matter of trial strategy.

APPENDIX D
Original Allegations
IP87-414C
in part

Attorney James Bradford failed to prepare before or during trial; did not interview or call witnesses to testify on behalf of the petitioner; worked out a plea-bargain agreement contrary to the wishes and instructions of the petitioner and tried to persuade petitioner to accept said agreement, even though petitioner was innocent, to serve his own interest; caused self interest and third party interest and influences to enter the tribunal; created an atmosphere to bias and prejudiced the trial judge against the petitioner; deliberately confused, frustrated, and aggravated the petitioner on the witness stand to lessen the impact of his testimony upon the jury; failed to investigate accountant Ricci's background in order to discredit the trustworthiness of Ricci's records and testimony; abandoned all loyalty to the defendant in order to lose the trial, make an appeal, receive $15,000, serve self and third party interest, and to force Judge William Steckler to step down as chief judge; relied upon a case called the Wheat or Oats case which was neither on point nor current; refused to explain the evidence in the closing argument; refused to object to misstatements (prejudicial ones) by the prosecutors in the closing argument; caused Federal Judge Cale Holder to enter the chambers of Judge William Steckler to create an argument, minutes before the offering of (deceased) accountant Ricci's records and testimony into evidence, in order to frustrate, aggravate and anger the judge into admitting said records and to increase the probability of errors being created in the admission of said records, refused to call character witnesses at the sentencing hearing; advised the defendent to make a twenty minute speech, at sentencing, derogatory to the government, which petitioner later learned was recommended by Bradford in order to receive a greater sentence to enhance the probability of a reversal at the appellate level; failed to pay sufficient attention to the appeal

brief so as to prevent mis-spelled words and less than adequate emphasis upon the hearsay nature of accountant Ricci's records and testimony; failed to open and to have posted to the accounting ledgers and journals a box of receipts which would have substantially changed the cash-flow statement submitted by the S.E.C.: failed to recognize the detrimental and fatal effect of his not accepting the verbal notice of the Government's intention to present hearsay records and testimony as evidence from a (deceased) unavailable witness as being sufficient notice, even though the rule stated that notice should be in writing, and to hire an accountant to review or audit records; injected a corney story, regarding Lyndon Johnson, into the closing argument to make it appear that he and the petitioner were of a different political party than they actually were in order to aggravate the judge and to bias the jury. Bradford had no trial strategy at all. His aim, which cannot possibly be considered trial strategy in the interest of the petitioner, was to connive and to agitate the tribunal to the extent that it would and did become a farce and a mockery of justice as evidenced by his having the petitioner reiterate the history of politically motivated abuse of the petitioner over a sixteen year period, through the petitioner's testimony, which was stopped by Judge Steckler. Bradford's actions could serve only himself, Jenner, Holder and Melangton, a law partner, (who at that time could not practice in Judge Steckler's Court) all to the disregard and detriment of his client, the petitioner.

Bradford's actions denied the petitioner due process under the U.S. Constitution. Due to Bradford's intense loyalty to Judge Cale Holder, who had been Bradford's benefactor since Bradford's father had asked Holder "to take care of his son Jimmy," whose loyalty and closeness is further evidenced by James Bradford having named his son after Cale Holder, and the intense dislike for and competition with Federal Judge Steckler it was not possible for petitioner to receive a fair trial and due process in Chief Judge Steckler's court because of Bradford's

bringing self interest and third party interest into the tribunal which totally outweighed his interest in pursuing an acquittal for the petitioner.

Bradford's failure to hire an accountant after verbal notice at pretrial, of the government's intent to present Ricci's records resulted in a complete miscarriage of justice. This fatal error resulted in a proceeding inconsistent with the rudimentary demands of fair procedure.

Bradford's refusal and deceit in the calling of witnesses had the same effect.

Bradford's presence in Judge Steckler's court and his actions therein denied the petitioner assistance of counsel. Bradford was the best factor going for the government, without his assistance to the prosecution, and his disservice to the petitioner, a conviction could not have resulted.

PROSECUTORIAL MISCONDUCT

The Assistant United States Attorney Roger Duncan knew that there was no evidence to sustain an indictment or conviction under Securities Laws of the U.S. and that a mail fraud indictment could have been accomplished only by departing from the true facts and ontology of the matters and by relying upon the incomplete records and self serving testimony of Ricci whose records and testimony he knew to lack trustworthiness, thereby, creating an illusion of wrongdoing. In Duncan's connivance it was necessary that a confused illusion that the Morris Dickey Leasehold Estate and General Oil, Inc. were one and the same entity when in fact he knew or should have known that each was a separate distinct legal entity; thereby alleging that alimony payments to the petitioner's estranged wife from the petitioner's salary were illegal while failing to make the same allegations regarding the payroll deductions of Social Security, Indiana and Federal Income Taxes withheld from the petitioner's same salary, or that Ricci's salary and deductions were illegal.

Duncan by departing from the true facts through the adoption of Ricci's incomplete records and testimony as fact enabled the cash flow statement (the second

most damaging evidence produced) to be prepared by S.E.C. Attorney and C.P.A. Mr. Paul who knew the statement to be false and fraudulent.

When questioned privately regarding items included in the statement which Paul knew for a fact had been paid out legally his only reply indicated his knowledge that his cash flow statement was inaccurate: "You hired Ricci, we did not hire him." Paul knew that Ricci's records which were not complete and that his testimony which was near gobbledygook ("Chappell ran the company as if he owned it." Chappell did own it-one hundred percent) created a near nonsensical illusion. The records placed all expenditures in the account of Robert Chappell (the petitioner) to be posted out, sometimes months later, when all back up records were in order. The accountant further knew that Ricci was several months behind in his accounting work which would leave many items (both completed and incompleted ones) in the account of Robert Chappell which should have been posted out and into other accounts. Paul further knew that the large unopened box of receipts should have been posted in order to obtain a true cash flow statement in accordance with generally accepted accounting principles. The cash flow statement ignored the inflow of hundreds of thousands of dollars of assets which flowed into General Oil, Inc. through loans, contributions to capital and from sales which were not reflected in the testimony or records of Ricci. Not only did Duncan's departure from the truth in favor of Ricci's testimony and incomplete records operate as a fraud upon the grand jury which brought the indictment but it had the same effect upon the tribunal so as to create a farce and a mockery of justice. It also violated the Code of Professional Responsibility EC7-13 and EC7-26 as well as corresponding A.B.A. cannons.

Prosecutor Roger Duncan and a government witness (S.E.C. official who took Ricci's testimony) failed to disclose previous testimony for the government in an income tax trial against Ricci's employer in a Florida

Federal Court and Ricci's extensive Mafia connection going all the way back to Ricci's childhood when he was held on the lap of Al Capone.

Duncan, propounded the illusion that General Oil, Inc. could not buy buildings, motels, or oil leases, and pay bills as a separate distinct legal entity when in fact he knew that it could. Duncan, the S.E.C. witnesses, and the postal inspectors all committed perjury by creating the fraudulent illusion that petitioner had drilled ten wells on the 150 acre Morris Dickey Lease in order to defraud investors when each one of them knew that petitioner had not had sufficient time to drill additional wells nor was he under any time deadline to drill additional wells when General Oil, Inc. was enjoined, placed into receivership (out of the control of the petitioner) into the hands of the receiver and that the petitioner could not have drilled additional wells, even if he had tried to drill additional ones, when he no longer owned or controlled General Oil, Inc. or the Morris Dickey Leasehold Estate.

Prosecutors Duncan and Turner deliberately and maliciously alleged that the petitioner had tried to defraud his ex-wife in the divorce settlement when there was no evidence in the record to indicate that, that crime had been committed or alleged by anyone other than by the two of them. Said conduct was in violation of the Code of Professional Responsibility, EC7-13; "the prosecutor's duty is to seek justice, not merely to convict." The code further states on the subject of withholding evidence and failing to produce witnesses: "A prosecutor should not intentionally avoid pursuit of evidence merely because he believes it will damage the prosecution's case or aid the accused." Yet, the evidence which would have completely vindicated the petitioner in writing the letter, for which he was convicted of two counts of mail fraud upon which his conviction was based and for which this petition is filed was not made available.

The above statements were requested from the prosecutors and postal authorities but they were not fur-

nished to the petitioner.

The prosecutor withheld evidence and in so doing suborned perjury by a S.E.C. witness in failing to produce testimony and records showing that Ricci had been a government informant and witness in an income tax trial of his former employer at the Racquet Ball Club in south Florida, and in failing to disclose Ricci's extensive connection with Mafia and/or Chicago Syndicate, which information if known to the petitioner and the court would have destroyed the trustworthiness of the records and testimony of Ricci, rendering both inadmissable under the exceptions to the hearsay rules of evidence under which the records of the (allegedly) deceased witness were admitted.

The effect of the above actions of the prosecutor denied the petitioner his liberty without due process of law as prohibited by and in violation of the 6th and 14th Amendments to the Constitution of the United States. The said actions of not supplying information from investors favorable to the petitioner denied him reasonable doubt in defiance of the 5th Amendment of the U.S. Constitution.

The Honorable Judge William E. Steckler, during the petitioner's testimony, stopped the petitioner's testimony, excused the jury and stated to the effect "trial transcripts can be misused with the type of information which is being put into the record." Judge Steckler further stated, "that kind of testimony can be harmful to you also." Judge Steckler should have stopped the harmful and irregular testimony sooner, before several minutes of harmful testimony had been heard by the jury.

Judge Steckler should have taken sterner action to correct Bradford's approach to the trial. The declaration of a mistrial would have allowed the petitioner time for a different attorney and prevented a gross miscarriage of justice.

Judge Steckler should have enforced Cannon 3 B(3) "A judge should take or initiate appropriate disciplinary measure against a judge or lawyer for unprofessional conduct of which the judge may become aware." Judge

Steckler being the Chief Judge and having presided over thousands of trials must have detected Bradford's chicanery as well as the frustrations of the petitioner caused by Bradford's actions.

Judge Steckler stated at sentencing comments which indicate that he was aware of what Bradford had been doing. Judge Steckler said, "Are you going to appeal?" Bradford responded, "Yes." Steckler stated "that is what I thought." Judge Steckler had earlier stated,"You should hire a good lawyer."

The over all effect of the trial process was that it was made into a farce and a mockery of justice. Thereby, denying the petitioner his 5th, 6th, and 14th amendment rights.

The Honorable Judge William E. Steckler allowed third party interest and influences, namely those of Federal Judge Cole Holder, William E. Jenner, and Phil Melongton to enter the tribunal. While justice would have been better served had Judge Steckler declared a mistrial on his own initiative, had the petitioner not hired Bradford or else fired him during the trial, as petitioner was tempted to do, justice would have also been better served. The cause and effect of the events of the overall proceeding created an unfortunate set of circumstances for all concerned. Only a characterlogical personality could have created such a chaotic series of events, and gotten away with it, under the noses of so many people. The characterlogical persons mind does not process cause and effect. His ego centered nature forces him to have his way regardless of the cost or harm to others. Bradford's obsession, to overturn Judge William E. Steckler, was so compelling that loyalty to his client was totally abandoned and the tribunal was turned into a farce and a mockery of justice. Thus the petitioner was denied due process of law.

The hand written yellow tablet pages not only had been removed from each investors file folder but none of the agreements had been obtained from the investors while all of the documents useful to the government had been obtained from the investor's witnesses. The

pages authorized the petitioner to negotiate the sale or exchange of the investor's interest in the Morris Dickey Leasehold Estate to another person or entity.

APPENDIX E

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

ROBERT SAMUEL CHAPPELL
Petitioner,
vs.
UNITED STATES OF AMERICA
Respondent.

CAUSE NO. IP87-414-C

JOHN PAUL GODICH,MAGISTRATE

PETITIONER'S REPLY ADDRESSING ISSUES OF CAUSE AND PREJUDICE PER ORDER OF THIS COURT DATED MARCH 30, 1988

Comes now petitioner, Robert Samuel Chappell, in compliance with the above said order of the court, to file a reply addressing the issues of cause and prejudice as ordered.

Petitioner, while grateful for the court's consideration of the pro se proceedings, hereby requests that the court take notice of the attitude expressed by the United States Supreme Court in Haines v. Kerner 92 S. Ct. 594 (1972) regarding pro se pleadings:

"We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of fact in support of his claim which would entitle him to relief."

"Accordingly, although we initiate no view whatever on the merits of petitoner's allegations, we conclude that he is entitled to an opportunity to offer proof."

In the event the court cannot find sufficient grounds for reversal, from the trial record and from petitioner's pleadings and evidence, petitioner requests an opportunity to prove any disputed fact or statement heretofore or herein made and pursuant to rules 6, 7 and 8 of U.S.C.A. § 2255 for discovery, expansion of record and evidentiary hearing.

"In a close case a relatively innocuous blunder may tip the balance against a defendant, but, in a case where the proof of guilt is strong, the same mistake would not necessarily justify a reversal." Johnson v. United States (1970 CA9 Ariz.) 424 F.2d 537.

Judge Steckler stated, "I think the reason the jury convicted you is because the incorporators were barely known to you." Corporations are incorporated in Indiana and all around the world by lawyer's secretaries and others who never meet or see the principals. Incorporators are so insignificant that in many jurisdictions they are no longer required in the formation of corporations.

If the petitioner was to have been convicted under 18 U.S.C. § 1341, the conviction should have been for "devising a scheme to defraud persons of money or property." The petitioner contends that the government's case was so weak that only the circumstances surrounding the conviction could have made the conviction possible. It was a case which was brought years after the alleged crime. Both the accountant who had prepared the records and the receiver in whose custody the records had been kept were deceased. The investor witnesses were five to seven years older than when their investments were made. Petitioner had been away from Indiana for nearly five years by trial date. The petitioner unfortunately hired an attorney with obsessions against the trial judge as well as ambitions of causing his resignation. The attorney compelled by his own self interest and third party interest actually made himself an opponent of his own client. Prosecution's interest was in obtaining a conviction at any cost of integrity. The judge was confused by the spectacle to the extent that he allowed errors to occur. The petitioner was

drugged, confused and deceived at each turn. There was prejudice "aplenty" from those factors alone as recognized by FRCP 48, 52, and rules of evidence.

Only the circumstances surrounding the trial could have produced such a confusing result. The petitioner was acquitted on nine counts including the scheme count yet convicted on two latter counts in the nonsensical indictment which established, as the Appellate Court found to be true, that the Morris Dickey Leasehold Estate investors had no property rights in General Oil Inc. yet what General Oil Inc. did with its money was the evidence used to obtain the conviction. This is not possible post McNally, 797 L Ed 2d, 292, which defined and narrowed the parameters of 18, USC 1341.

The case was so weak that it was left hanging at each stage only by a thread and then only by deceit, trickery and unique circumstances.

The petitioner believes that even if the strict standards of Frady, 465 U.S. 152 (1982) are applied it would be concluded that the circumstances surrounding the trial justify a reversal without a showing of further prejudice.

Another element-that of intent-was not properly shown, in trial, argued or defended. Neither the district trial record nor the Appellate Court could point to one secret or hidden act which would indicate a bad intent. The Appellate Court found this to be true just as it found that a motel had been transferred into General Oil, Inc. (not out of General Oil, Inc.) This would hardly be the pattern of one with an intent to defraud, U.S. v. Robert S. Chappell, 698 F. 2d 308 (7th Cir. 1983).

Is society really interested in maintaining the finality of a conviction of an innocent person? Even the Frady Court says that it is not. Both U.S. v. Cronic and Strickland v. Washington, 466 U.S. 648, 80 L Ed 674, 104 S. Ct. 2052, say no. A fair trial for the accused is the goal, a trial in which confidence can be placed in the outcome, whose result is reliable, so that the guilty are convicted and the innocent go free.

Strickland v. Washington, supra, states the following: "An ineffective assistance claim asserts the absence

of one of the crucial assurances that the result of the proceeding is reliable, so finality, concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower" [24]. The test for prejudice is then stated [25]: "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland [26], [27], [28], [29] sets out standards for the decision maker, while the entire section is important particular emphasis should be placed upon the final two sentences of [29]: "Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors."

[33] "The principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial."...An ineffectiveness claim, however, as our articulation of the standards that govern decision of such claims makes clear, is an attack on the fundamental fairness of the proceedings whose result is challenged. Since fundamental fairness is the central concern of the writ of habeas corpus, supra, at 126, no special standards ought to apply to ineffectiveness claims made in habeas pleadings."

Per Strickland, supra, [24], "The results of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome."

Per Strickland, supra, [25], "The defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding

would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Then follows, Strickland supra, [29]:, "thus a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." Can there be, not only reasonable doubt, but even the slightest doubt regarding the outcome of U.S. v. Robert S. Chappell, 298 F. 2d, 308, had the unprofessional errors not occurred? Would any attorney not have done better? Was Bradford's performance not far below the standard one could expect from any attorney? The petitioner maintains the answers to those three questions to be firmly in favor of the petitioner's position.

In all of the cases cited by the government there was very slight prejudice shown resulting from the issues or errors to which the petitioner complained. However, in those cases cause and prejudice standards were applied and recognized as being the controlling tests. In each case there was strong evidence of guilt, which the errors could not overcome. A "fair trial" wherein justice resulted was the bottom line conclusion as well as that one could have confidence in the outcome of the trial.

In U.S. v. Robert S. Chappell none of the above characteristics of the trial were present. The petitioner was acquitted on nine of eleven counts, a fact which the Seventh Circuit Court of Appeals attributed to "lienity of the jury," a theory in which the Supreme Court of the U.S. rejects or places little faith, Strickland v. Washington, supra. The court further refused to "speculate" as to why the defendant was acquitted on nine counts including the scheme count yet found guilty on the two latter counts. Petitioner will speculate only that the decision resulted from deliberate chicanery on the part of Bradford to the greatest extent and only to a slightly less extent by the prosecution before a judge who had been tricked, confused, angered, invited and led into a position of tolerating the events; with the petitioner

in a similar position, having been told by another federal judge that; "Judge Steckler is a prick. No, he can't be a prick. A prick has a head," and having heard for over a week statements regarding the judge's prejudice in favor of the government, how Phillip Melangton had been barred from practicing in Steckler's court because he had represented a client too vigorously in an income tax case, the judge's ineptitude, his playing God, and his unpredictability as well as knowing of the misconduct of Judge Holder by entering Steckler's chambers to create an argument minutes before critical evidence was to be introduced, and the prosecution's willingness to conceal evidence, misrepresent the evidence and to make a deal constructively, implied or verbally on two counts.

The petitioner felt the strongest urge to jump to his feet and to object when Bradford failed to object to the government's mistatements. Had the petitioner not been given so called coffee sweetener the night before the petitioner testified, which did not sweeten coffee but kept the petitioner hyper and unable to sleep the entire night, leaving the petitioner tired, edgey, confused, depressed and disoriented, Bradford, most likely, would have been fired. This was the day the real dirt was done. It was revealed that no more witnesses would be called, the petitioner was improperly questioned, and the defense abruptly concluded over the petitioner's strong objection expressed to Bradford. Then Bradford refused to object in closing argument and made a sickly, weak argument himself.

Bradford stated: "The trial was so unfair. There was no one to question regarding the records." Both Bradford and Donald A. Talbert stated in the appellate brief that the trial was extremely unfair. Bradford failed to say that he made it that way by actually becoming "a deceitful opponent of his own client."

There is not the slightest doubt that there was a breakdown of adversarial process during the trial and that counsel failed to function in any meaningful sense as the government's adversary. The petitioner has from

the beginning pointed to "specific errors of counsel" to make out his Sixth Amendment claim of ineffective assistance of counsel, expecting and waiting to prove same. However, the petitioner does not concede that a Sixth Amendment claim would not be justifiably sustained by the surrounding circumstances as set out in United States v. Harrison P. Cronic 466 U.S. 648, 80 L Ed 2d 657, 104 S. Ct. 2039.

The Cronic case which supercedes Frady (42. [10b]) "that a defendant can attack the actual performance of trial counsel only through a petition for postconviction relief under 28 USC § 2255, and not through direct appeal because ineffective assistance claims are not properly raised in the District Court nor preserved for review on appeal." This was the government's argument. There is no waiver to petitioner's 28 USCA § 2255 Motion.

Bradford's law partner having been barred from practicing in Steckler's Court, the competition between Judge Cale Holder and Judge Steckler, Bradford's close relationship with Cale Holder, former U.S. Senator William E. Jenner, and the U.S. District Attorney, Bradford's intense dislike for Judge Steckler, Bradford's desire to overturn Steckler and to force him to step down as Judge or as Chief Judge, Bradford's inviting third parties; Jenner, Cale Holder and Jack C. Brown into the petitioner's case without consulting with petitioner and without having his consent, Bradford's having Judge Cale Holder enter the chambers of Judge Steckler to create an argument only minutes before critical hearsay evidence was to be considered for admission, Bradford's having his assistant Carissi put so called coffee sweetener in the petitioner's coffee to keep him awake all night and the atmosphere created from all of the chicanery including Bradford's having an artist enter the courtroom to draw pictures of all of the jurors and his method of questioning the petitioner could, in petitioner's opinion, lead to both conclusions which would sustain a reversal due to a Sixth Amendment claim of a presumption of ineffective assistance because all of

those factors "demonstrate that defendant's counsel failed to function in any meaningful sense as the government's adversary and that there was a breakdown of adversarial process during the trial." One could reasonably argue that a breakdown occurred even before the trial, to bargain away the defendant's defense, freedom, reputation and constitutional rights for the enhancement of the beforesaid group to serve their ends. Therefore no showing of prejudice would be required.

The cause of the above stated errors was ineffective assistance of counsel resulting from unprofessional conduct far below the standard which could be expected from any attorney. Had the errors not occurred it is reasonably likely that the defendant would have been acquitted on all counts in the indictment.

Prejudice is established because it is impossible to say beyond a reasonable doubt that the outcome of the trial would not have been different except for the above said errors of counsel.

An abandonment of loyalty to the defendant probably did not occur simply because there never was any loyalty from the start or else the attorney, Bradford, would have taken the petitioner's defense seriously: by preparing, interviewing witnesses, hiring an accountant and investigating and utilizing the information he was afforded, as petitioner assumed that he was doing. The only defense provided was that which the petitioner arranged himself and forced upon Bradford. This is true of both witnesses; Kreig and Majors who petitioner arranged to have present at the trial. Bradford would not have had either of them present had the responsibility for their presence been left to him. He would have lied about them as he did about Geeslin, Welsh, Shriver and others. Even after their presence was secured Bradford did not talk to them before they took the stand. He and Carissi then went through the list of questions, which petitioner had prepared, only half-heartedly. Carissi participated in the questioning process, the first and only time, on a key witness. Bradford's stated reason, for having Carissi question one witness, was because a young lady juror

had been staring at him. If that in fact was the case, the girl would not have been impressed by Carissi's performance. The only defense the petitioner had from Bradford was a hard fought for facadial performance. However, petitioner contends that this type of representation falls directly with the scope of the most significant and basic duty of the attorney to his client and that is "the duty of loyalty." Whiteside v. Scurr, 744 Fd 2d 1323, 1330, demonstrates a reversal based on conflicting interest and breach of loyalty. "Cronic's presumption of prejudice applies to only a very narrow spectrum of cases where the circumstances leading to counsel's ineffectiveness are so egregious that the defendant was, in effect denied any meaningful assistance at all.

"Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice." Whiteside v. Scurr, 744 F. 2d 1323, 1330 (8th Cir. 1984) and Cronic, supra at 104 S. Ct. 2039, 2046-47 [N25].

"Ineffective assistance of counsel claims that involve conflict of interest warrant the "presumption of prejudice" if the defendant demonstrates that counsel " actively represented conflicting interest and that an actual conflict of interest adversely affected his lawyer's performance."

"A conflict of interest may not necessarily involve multiple representation, but breach of counsel's duty of loyalty necessarily constitute conflict of interest. Whiteside v. Scurr, supra at 1330 citing Strickland v. Washington 104 S. Ct. at 2067 (1984).

In Whiteside v. Scurr 744 F. 2d 1323 (8th Cir. 1984) the Court of Appeals citing U.S. v. Cronic 80 L Ed 2d 657 (1984) and citing Strickland v. Washington 104 S. Ct. at 2067, reversed a conviction citing ineffective assistance of counsel due to "conflict of interest" even though there was no multiple representation. The court stated: "Conflict of interest necessarily implicate breach of counsel's duty of loyalty, which is perhaps the most basic of counsel's duties."

Petitioner admits that the trial record taken alone

(disregarding the off record events) one might conclude that Bradford did perform reasonably well in cross examination; however, from the time the petitioner's defense started until the conclusion of the trial and sentencing the petitioner had less than no counsel at all in that all of the previously stated events occurred plus in sentencing the petitioner was advised to make a twenty minute speech derogatory to the government and deprived of character witnesses. Davis v. Alaska deals with similar circumstances. The Cronic case, supra [7] states; "Most obvious of course is the complete denial of counsel. The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial. Similarily, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 US 308, 3 L Ed 2d. 347, 94 S. Ct. 1105 (1947), because the petitioner had been "denied the right of effective cross-examination" which "would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." supra at 318, 39 L Ed 2d 347, 94 S. Ct. 1105 citing Smith v. Illinois 390 US 129, 131, 19 L Ed 2d 956, 88 S. Ct. 748 (1968), and Brookhart v. Janis, 384 US 1, 3, 16L Ed 314, 86 S. Ct. 1245 (1966). Petitioner maintains that the presentation of his defense the closing arguments, and sentencing were critical stages of the trial and that he was constructively denied effective assistance of counsel in those three stages, constituting "constitutional error of the first magnitude." The Whiteside court [Note 14] stated "he became an adversary to his own client." I believe that Bradford was and adversary of his own client, "an opponent" if not from the beginning, certainly after the plea agreement worked out by Jack C. Brown (former Senator W.E. Jenner's law partner) in conjunction with Bradford, and more certainly from the beginning of petitioner's

defense presentation.

The cause was ineffective assistance of counsel due to conduct below the standard which could be expected from any attorney.

Even though prejudice is apparent in the conflict of interest and breach of loyalty to the client and should be presumed, from the errors of counsel, prejudice is established because no one can say beyond a reasonable doubt that the outcome of the trial would not have been different (resulting in acquittal on all counts) had counsel's errors not occurred.

In order to serve the conflicting interest of Bradford's self and third parties an appeal was required. In order to have an appeal a conviction would be required to the great risk and detriment of the petitioner. Beyond the slightest doubt Bradford's errors cast doubt upon the reliability of the outcome of the trial.

The petitioner, having worked with many attorneys in Indiana, all of whom had demonstrated a propensity for truth and correct performance, it was not possible for petitioner to respond quickly within two weeks, by changing his entire belief pattern to comprehend that an attorney would deliberately lose a trial to the great harm and detriment of his client.

On Saturday morning prior to the commencement of petitioner's defense, a meeting was held in Bradford's office with Bradford, Carissi, and the petitioner present. When petitioner arrived at 10 a.m. Bradford and Carissi were already there. The petitioner stated: "Come on, let's get going. We have not been hurt. We can win this thing. Regardless of the cost I can get the money." Bradford and Carissi looked at each other and grinned. I now know the meaning of that grin. Bradford had mentioned earlier the cost of getting witnesses there as if the cost might be a prohibitive factor. Bradford had already been given the $400, in cash, to summons Jack Shriver, the Quaker State Oil Co. land department head. Shriver knew all of the details of the lease acquisition and its development. Shriver had recommended drillers, lawyers, the surveyer and equipment dealers

as well as having helped to select and purchase the mineral rights to the 150 acre parcel. He had also recommended his son Barr Shriver, who was hired to manage and supervise and field operate the project.

The petitioner wanted to overcome that objection by letting Bradford know that winning was more important than the cost of the defense.

Bradford then said I may want to take you through all of those previous cases with the government. I replied: "I don't mind doing that if it will help." Bradford then began to question petitioner about that. The questioning took up the balance of the morning. However, it was agreed that petitioner would have Marlin Kreig, Pres. of Oilfield Reasearch and J.C. Majors, field engineer who had sat on the first Morris Dickey well and recommended its completion there. Bradford would get the other witness; Joanne Chappell, Jack Conley, Joseph Geeslin, Matthew Welsh and others as required. I had already arranged with Conley and Joanne Chappell and Jack Shriver to come subject only to a summons for Shriver and telephone calls to Chappell and Conley telling them when to come.

It was the testimony which Bradford had suggested, that was stopped by Judge Steckler, sua sponte, with the statement to the effect: "You would be amazed at what can be done with trial transcripts and this kind of testimony can be harmful to you also," as he looked and talked directly to petitioner. This occurrance indicates two things: 1. that Judge Steckler knew that Bradford was up to something to intimidate the court and 2. that the judge, to some extent, realized petitioner's sincerity and was looking out for his interest. However, many minutes of harmful testimony had already gone into the record. This event may have been the reverse intimidating factor which caused Bradford to dictatorially terminate the defense immediately after petitioner's testimony without allowing the diagram to be drawn, or to make clarifications or explanations of petitioner's testimony. Petitioner felt awful that day from no sleep and the horrible effect of the drug. Petitioner had never

used illegal drugs in his life nor had he used legal ones except sparingly in serious illness situations.

This occurance taken alone, wherein the trial judge in effect made a constructive finding of both ineffective assistance of counsel and revealed prejudice resulting therefrom, in comparison to other cases, could constitute ineffective assistance of counsel sufficient to sustain a reversal.

The cause was ineffective assistance of counsel resulting from performance far below the standard of representation which could be expected from any attorney. There is prejudice therefrom because it cannot be said beyond a reasonable doubt that but for the errors of counsel the outcome of the trial would not have been different- resulting in an acquittal of defendant on all charges.

Neither former U.S. Senator William E. Jenner nor Federal Judge Cale Holder would have entered the petitioner's case unless they "had big game in sight," a motive and interest beyond and other than the petitioner's interest, which was an acquittal of the petitioner. To serve the interest of Jenner, Holder, and Bradford a conviction, to appeal, was necessary.

Surely, the government could not be interested in maintaining a conviction, under the above circumstances. Could society be served thereby? Do the "Cannons of Ethics" for lawyers, prosecutors and judges have any meaning at all?

Attorney James Bradford failed to prepare before or during trial. The cause of the error was ineffective of counsel, below the standard to be expected from any attorney.

Prejudice is established because it is impossible to say beyond a reasonable doubt that had Bradford prepared a defense by interviewing witnesses, investors and the government's witnesses that the outcome would not have been different.

Lists of potential witnesses were furnished to Bradford along with many pages of details and facts regarding the allegations contained in the indictment. Had Brad-

ford hired an accountant to look at the records and to testify regarding the records Ricci's creditability, which had been established only by the testimony of the two government employees, would have been highly questionable thereby rendering the records inadmissable under the exceptions to the hearsay rules of evidence wherein reliability is the factor determining admissability under those exceptions to the rule.

Attorney Bradford did not interview or call witnesses to testify on behalf of the petitioner. The cause of the procedural default was ineffective assistance of counsel due to unprofessional conduct, which was below the standard to be expected from any attorney.

Prejudice is established because, even though one more witness could have made a difference in the outcome of the trial, it is impossible to say beyond a reasonable doubt that had Bradford called the scheduled and anticipated witnesses that the outcome of the trial would not have been different.

Witnesses were standing by in anticipation of being called as evidenced by the affidavit of Jack F. Conley. Others were not even contacted. Bradford had been given $400 in cash to cover the airplane ticket, summons cost, etc. for Jack Shriver who would be prohibited from coming by his employer, Quaker State Oil Co., unless summoned. Bradford lied about summoning Shriver, kept the money and stated, "the marshalls could not find him." When questioned about Matthew Welsh and Joseph Geeslin after the defense was dictatorial rested by Bradford, he replied, "they would not answer my phone calls." Joe Geeslin stated; "that was untrue when asked several months later."

The petitioner fully expected Jack Conley, Joanne Chappell, Joe Geeslin and Matthew Welsh to be present on the second day of the defense. However, the defendant was the only witness present to take the stand. None of the witnesses had been contacted by Bradford. They would have come at his request as indicated by Conley's affidavit, Geeslin's statement to the petitioner and Joanne Chappell's statement to the petitioner.

Petitioner arranged for the two witnesses, Marlin Kreig and J.C. Majors, petroleum engineers whose testimony was only half-heartedly solicited by Bradford and his assistant Carissi. Carissi questioned J.C. Majors who had sat on the first well and recommended its completion, in a tone so low he could barely be heard or understood. Both attorneys went through the list of questions prepared by the petitioner in a much less than enthusiastic competitive way. Judge Steckler's surprise at having the trial concluded with so little defense is expressed in transcript, page 1546, lines 11 through 21.

In comparison to other cases researched, where single issues stating only slight errors were raised, Petitioner contends that the witness Jack F. Conley, a petroleum geologist and Oil Company President, from whom the court has a sworn affidavit, taken alone would be sufficient for an acquittal on the two counts or to at least to have cast reasonable doubt in the minds of the jurors' regarding guilt on the remaining two counts. Conley's testimony is outlined in his affidavit. Any competent attorney would have called Conley as well as Joanne C. Chappell, Joseph Geeslin, Jack Shriver, Matthew Welsh, investor witnesses, and William Bevevino, attorney, and others from the list of potential witnesses. Strickland v. Washington, supra, deals with this issue.

Bradford worked out a plea-bargain agreement through Attorney Jack C. Brown contrary to the wishes and instructions of the petitioner and tried to persuade petitioner to accept said agreement even though petitioner was innocent to serve his interest.

The cause of the procedural error was ineffective assistance of counsel, due to unprofessional conduct below the standard one could expect from any attorney.

Prejudice is established because it is impossible to say beyond a resonable doubt that had Bradford not treated the petitioner as a political pawn, as if he owned him, to be bargained for favors in other cases and to receive an easy $35,000 for no more than eight to ten

hours of work, that the outcome of the trial would not have been different.

Bradford had been told several times that petitioner was not guilty of a crime that had never existed and that he would not plead guilty to anything.

Petitioner was shocked when he returned from California to Indianapolis to stand trial, only three days before trial time to find that in spite of the massive amount of information given to Bradford that no preparation had been made. Bradford said: "Jack (meaning Attorney Jack C. Brown) has worked out a plea-bargain agreement." Bradford stated: "What do you care? You do not have to live around here." Petitioner's response was: "but I would have to live somewhere and that kind of record will follow men wherever I go." Bradford's response was: "but Duncan doesn't want to put you in jail. He only wants to exercise control over you for a few years." Bradford further said: "it will be an information only not mentioning fraud."

Bradford then said: "You may be O.K. on these earlier charges in the indictment but I'm not certain about these latter ones." How could he know that or even assume it when he had not interviewed witnesses or done any investigation? Bradford, after realizing that plea-bargaining was out of the question, said: "You have nothing to worry about." It was only then, that he mentioned for the first time that accountant Ricci was dead, that the receiver was dead and that Matthew Welsh had signed a statement saying that the records were in disarray.

It was in this conversation that petitioner was informed that Phil Melanton, Bradford's law partner, could not be hired to assist in the trial because he could not practice in Steckler's court. Bradford went ahead to discuss Steckler's bias and his playing God and the fact that Steckler had been overturned many times and that he had done it once and could do it again.

Petitioner was further informed that notice of the government's intention to use deceased accountant's Ricci's testimony in the trial had not been given to him at pre-trial conference in writing as required by federal

rules of procedure.

Bradford was asked by petitioner what the accountant, he was to have hired, had to say about the records. Bradford informed petitioner that none had been hired, but that he would find one.

Petitioner hereby restates all of the allegations contained in petitioner's original petition, wherein approximately 22 errors under ineffective assistance of counsel, 12 under prosecutorial misconduct, and 4 under judicial misconduct are stated, and alleges the following:

The cause was ineffective assistance of counsel below the standard which could be expected from any attorney.

Prejudice is established because no one can say beyond a reasonable doubt that each error taken alone did not effect the outcome of the trial, thereby rendering its result unreliable; and that all of the errors combined did not have an enormous effect upon the outcome of the trial, making it a violation, of the petitioner's Sixth Amendment Rights, of the first magnitude, thereby, rendering the outcome of the trial unreliable and resulting in a conclusion in which no one could have confidence.

In U.S. v. Frady 456 U.S. 152, 71 L. Ed. 2d 816, 102 S. Ct. 1584 reh den. (U.S.) 73 L. Ed. 2d 1296, 102 S. Ct. 2287. The Supreme Court relied upon its decision in Davis v. United States, 411 U.S. 233, L. Ed. 2d 216. In that case there was an absence of a showing of actual prejudice therefore the federal prisoner was barred from raising an issue not before raised regarding Grand Jury selection. The application of waiver provisions were recognized but only in the absence of no showing of "actual prejudice."

The Frady case re-established the "cause and actual prejudice" standard as the standard for review of a motion under § 2255 for vacation of a sentence and to obtain collateral relief based on trial errors to which no contemporaneous objection was made thereby concluding that a convicted defendant must show both "cause" excusing his double procedural default, and

"actual prejudice resulting from the errors of which he complained."

In Frady, the prisoner failed to meet his burden of showing actual prejudice, since he had never presented colorable evidence indicating such justification, mitigation, or excuse that would reduce his crime from murder to manslaughter. "The evidence in the record compelled the conclusion that there was "malice aplenty" and there was no substantial likelihood that the same jury that found the prisoner guilty of first-degree murder would have concluded, if only the malice instructions had been better framed, that his crime was only manslaughter.

In U.S. v. Robert S. Chappell four (4) causes were shown. Each cause taken singularly would be sufficient under Frady to excuse the double procedural default. The "actual prejudice" resulting from the errors to which petitioner complains should be far greater than merely sufficient to meet the burden to cause any judge to conclude that there was actual prejudice "aplenty" to cause the same jury that found the petitioner guilty on two (2) counts of mail fraud to have acquitted him on those two (2) counts also, as it had done on the previous nine counts, had the errors not existed. An objection by James Bradford when Prosecutor Turner in effect divided the conspiracy into two conspiracies ("If you cannot convict the defendant on the earlier counts you can convict on the latter ones.") would have provided for an acquittal on all counts. All Bradford would have needed to do is to stand and say: "I object Your Honor. There is only one conspiracy alleged. The defendant is either guilty of the conspiracy whereby he may be guilty of some of the counts or else there is no conspiracy and he is guilty of none of the counts. Instead of objecting, as the defendant pressed upon his shoulder asking him to object, Bradford just sat there staring and grinning at Judge Steckler.

The jury deliberated until late at night. Then the next day, the jurors sent out a note asking about this conspiracy issue. Bradford could have prevented the harm-

ful prejudice not only by making the above objection, but by stating in the closing argument that there was only one conspiracy alleged and that the defendant was either guilty of all counts or else he was guilty of none of them. The defendant had specifically asked Bradford to do the above but as the record will indicate Bradford erred in not making the point clear. The petitioner believes (due to all of the surrounding circumstances) that Bradford failed to object in order to have a conviction to appeal, to force Judge Steckler to step down, and to enhance Barker's probability of being appointed.

The calling of one more witness, any one of them, could have and probably would have made the difference necessary for an acquittal on the two counts for which petitioner was found guilty. If Joanne Chappell had been called to testify that she had not been defrauded in the divorce settlement and that no attempt had been made to defraud her, Prosecutor Duncan would not have been able to allege a separate crime (plain error under rule 52) as he did by stating contrary to, the only evidence in the record, the petitioner's testimony. Duncan's statement was the opposite to the evidence. Duncan stated "He lied about that. He attempted to defraud his former wife in the divorce settlement." In spite of strong nudging and urging, Attorney Bradford just sat there grinning at the judge and refusing to object. All Bradford would have had to do was to object on the grounds that there was not one (1) shred of evidence in the record to support the conclusion that the petitioner had lied or that he had attempted to defraud his former wife. Joanne Chappell was standing by waiting only for a call from Bradford telling her when to come to Indianapolis.

Attorney Joe Geeslin, who was only two (2) to three (3) blocks from the courtroom was fully expected to be present on the day the petitioner testified. Bradford simply lied about Geeslin's having not returned his call. Geeslin so stated, months after the trial, that Bradford had not called him.

Joe Geeslin would have testified that he had assisted

the petitioner in personal tax matters as well as on all tax calculations for the Morris Dicky Leasehold Estate Investors. He would have testified as to the tax advantages of the investment to the investors. Geeslin would have testified that he had advised petitioner to hold funds in cash; that he had provided a place for the cash to be held while he worked out an understanding regarding General Oil, Inc. with Don Cantrell the collection agent of the I.R.S. Geeslin would have further testified that he had assisted and advised the petitioner regarding the taking of assets including money by petitioner's estranged wife, and that he had negotiated a verbal give back and hands off agreement regarding certain General Oil, Inc., assets. Geeslin's testimony was very important and could have made the whole difference between the conviction and an acquittal on the two (2) counts.

Geeslin's testimony regarding the letters to Hasenour (count 11) and Sellers (count 10) to the effect that he had been consulted, regarding the tax implications of a change of the medium of investment from working interest to equity, cash, or debt instrument, would have made a conviction on counts ten (10) and eleven (11) nearly impossible. The cause was ineffective, unprofessional assistance of counsel. The prejudice therefrom was "aplenty." The ineffective assistance of counsel (per U.S. v. Cronic) caused the prosecution's case to fail to have the required survival of the crucible of meaningful adversarial testing. The trial process lost its character as a confrontation between adversaries, thus, the Sixth Amendment constitutional guarantee was violated. Bradford's actions went even further than sacrificing an "unarmed prisoner to gladiators." Bradford handed the petitioner's arms to the gladiators, held him in a tied position for the gladiators to inflict their swords while he grinned at the judge and received great enjoyment from the sacrifice. Who could possibly doubt that the trial process and its outcome was rendered unreliable- that the petitioner did not receive a "fair trial" with a result which could be considered reliable.

Regardless of the "height of the hurdle" petitioner believes beyond the slightest doubt that the cause and prejudice standard applied, to U.S. v. Robert S. Chappell, clears that hurdle, (Cronic).

In Norris, the court decided in favor of cause and prejudice rather than the deliberate bypass standard and applied the cause and prejudice standard.

It should be pointed out that Norris v. United States was decided August 13, 1982, and that U.S. v. Kovic was decided on September 17, 1987, adopting the cause and prejudice standard. The court so states 830 F. 2d 683, II paragraph 2. Both U.S. v. Cronic and Strickland v. Washington confirm the cause and prejudice standard as the test. It can therefore be concluded that no waiver or bar to the petitioner's raising claims of error of constitutional magnitude which rendered the trial of petitioner unfair and subjected its conclusion to become totally unreliable. The government's argument of waiver must fail.

Bradford failed to clarify and to advance the crystal clear fact that no property rights ever existed in General Oil, Inc. for the Morris Dickey Leasehold Estate working interest purchasers. It had been agreed that petitioner could draw a diagram on the blackboard to establish this fact to the jury; however, in spite of petitioner's pleading after his testimony, Bradford would not allow petitioner to take the stand to present the evidence which would have revealed the government's case to be totally without merit. The diagram would have revealed the following facts. The Appellate Court found from the skimpy evidence petitioner's claim to be true but missed the significance.

If in fact funds, of General Oil, Inc., were stolen or missed it would not constitute mail fraud as charged in the indictment. There were state remedies of embezzelment and civil action. Mail fraud was not possible since no property rights were established in General Oil, Inc. per McNally v. U.S., US 107, 2875, 2881-2, 97 L Ed, 292 (1987) and Sigmond v. Brown, 828, Fd 2d, 8, (9th Cir 1987).

The conclusions of the Seventh Circuit Court of Appeals in U.S. v. Robert S. Chappell, F.2d 698 at 308, reveals a decision based upon unprofessional conduct of counsel prosecutorial misconduct and a politically corrupted tribunal. The Court of Appeals found that no property rights were established in General Oil, Inc. Yet, the court went straight forward to affirm the conviction. Without property rights there could be no mail fraud conviction. The defendant fought hard with the counsel to get the point across that what General Oil, Inc. did with its money was not "any of the government's damned business." It was only what General Oil, Inc. did with the Morris Dickey Leasehold that could be considered in a U.S. 28, 1341 indictment. Paying salaries, buying buildings, and paying operating expenses are what any corporation can do with its money. Bradford's refusal to allow the petitioner to draw the diagram explaining General Oil's relationship to the Morris Dickey Leasehold Estate investors was a gross failure on his part. That point created a mass of confusion even at the Appellate level.

Misappropriation of funds, embezzlement, theft or a variety of other charges might have been made if wrong doing had actually occurred. However, it would not constitute mail fraud per U.S. v. McNally and Sigmund v. Brown. The court found that a motel had been transferred into the corporation- not out of the corporation.

The court found the mailing dated April 14, 1977 to be a lull letter. It was in fact everything but a lull letter. It did not say that a sale for the Morris Dickey Project is imminent. It said we have decided not to sell. The meaning of that is that, in spite of the problems which all had been made aware (with the government) we could go forward without selling or transferring to another entity.

Investors had a right to know the outcome of the decision which had been under consideration with their advice, consent and conditions.

Norris v. United States 687 F. 2d 899 (1982) states: "In some cases there may be a good reason for this

weird procedure- such as incompetence of counsel in the first appeal, newly discovered evidence, or an intervening chance in the law- and if so the appellant will be able to demonstrate good cause for his failure to appeal the first time and will therefore be allowed to appeal a second time."

Cause and prejudice are established through ineffective assistance of counsel if the counsel failed to make a motion which would have succeeded on an issue of importance to defendant.

United State v. Johnson, 707 F. 2d 317, 320 (8th Cir. 1983) citing U.S. v. Easter, 539 F. 2d 663 (8th Cir. 1976)

See Riley V. Wyrich, 712 F. 2d 382, 385 (8th Cir. 1983) "Where a defendant has failed to obtain fair appellate review of his conviction by reason of the denial to him of a constitutionally guaranteed right, means have been found to rectify the wrong by providing an appellate review of the conviction."

See Grey v. Greer, 800 F. 2d 644-646 (7th Cir. 1985) (Failure to raise a significant and obvious issue on appeal constitutes deficient performance under the first part of the test in Strickland v. Washington, 104 S. Ct. 2052, 801 L Ed 2d 674 (1984). If an issue which was not raised may have resulted in a reversal of the conviction or an order for a new trial, the failure was prejudice."Id.).

Both prosecutorial errors constituted plain error under rule 52, however the burden would have been much less on direct appeal or in a new trial motion.

One additional issue should be raised regarding the appeal to the Seventh Circuit Court of Appeals wherein the cases cited would apply. While the issue is a conflict of interest and breach of loyalty issue basically, it should be raised at this point.

Because of petitioner's great respect for Don A. Tabbert, in whom petitioner has great confidence, and the then developing distrust and disrespect for James Bradford, Tabbert's firm was employed to participate in the appeal. Don A. Tabbert testified in cause no.

IP-86-130-CR that his firm had done nearly all of the work in the appeal. Bradford had been paid $15,000 and Tabbert's firm only $10,000.

The petitioner realized the extent of the conflict only after being incarcerated in the Marion County Jail. One of the attorneys mentioned herein called Tabbert and stated: "Say it isn't so Joe." This occurred as a result of former U.S. Senator Birch Bayh having joined Tabbert's firm. The act of bringing Tabbert into the appeal picture would have deprived Bradford of the glory he was seeking in overturning Judge Steckler and at the same time enhanced Tabbert, which would not have been desirable at that time.

No comment contained herein is intended to cast any bad light upon Don A. Tabbert or his firm. Petitioner believes that Tabbert's firm did the best it could do, with what it had to do with, regarding the trial record and assistance or lack of it from Bradford. Grey v. Greer, supra, would apply along with related cases.

A further breach of loyalty would have occurred on the part of Bradford.

CONCLUSION

Having researched hundreds of mail fraud cases brought since 1872 the petitioner can say beyond a doubt that none come even close to being as twisted, confused, and intrigue-filled as IP 79-50-CR. "Much to do about nothing" is a cliche, which understates the case. The appellate's opinion approaches "Orvillian, 1984," double speak. The opinion of the court says in essence he did nothing wrong therefore we affirm the conviction. Putting a motel into General Oil, Inc., putting $90,000 in cash plus land, and art and having properly formed and capitalized the company in its beginning counts for nothing. "But you did buy a building and take a little money out in the form of salary, payroll deductions, and expenses and you bought a building. All are legal acts which all corporations can, must, and should do. The Appeals Court then says but you are not looking at the facts in the light most favorable

to the government.

The petitioner has found no case where an innocent, brief, report was sent to investors containing checks, on the right amounts (admittedly true by Prosecutor Turner in closing argument) was termed a "lull letter." There was nothing about which petitioner needed to "lull" the investors.

If the petitioner is to be labled for life as a "mail frauder", please let the record show that he was the dumbest "mail frauder" in history, since the petitioner spent much of his own money, borrowed money, and assets into the project. The "dumbest mail frauder" did not take money and run when he had many hundreds of thousands of dollars in cash. He spent it drilling 10 oil well, building roads and clearing other drill sites. All of those acts are not what a "mail frauder" ought to do. Perhaps the , so called, "mail frauder" is mis-labeled.

Justice, in this case demands a reversal. The petitioner did not receive a fair trial.

Supreme Court, U.S.
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No. 89-1040

In the Supreme Court of the United States

OCTOBER TERM, 1989

ROBERT S. CHAPPELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
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QUESTION PRESENTED

Whether the district court correctly denied petitioner's motion to vacate his sentence under 28 U.S.C. 2255 on the ground that petitioner failed to demonstrate cause for his failure to raise his claims on direct appeal of his conviction.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1040

ROBERT S. CHAPPELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 16-18) and the order of the district court (Pet. App. 26-29) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1989, and a petition for rehearing was denied on September 25, 1989. Pet. App. 18. The petition for a writ of certiorari was filed on December 26, 1989 (a Tuesday following a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Indiana, petitioner was convicted on two counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to three years' imprisonment and four years' probation. His conviction was affirmed on direct appeal. *United States* v. *Chappell*, 698 F.2d 308 (7th Cir.), cert. denied, 461 U.S. 931 (1983). Thereafter, petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. The district court denied relief, Pet. App. 26-29, and the court of appeals affirmed, Pet. App. 16-18.

1. The evidence at trial, which is summarized in the opinion of the court of appeals on direct appeal, 698 F.2d at 309-310, showed that in 1975 and 1976, petitioner operated a company that drilled oil wells in Pennsylvania. In his financing and operation of the business, petitioner misrepresented to the investors the number of oil wells in operation, the use of the invested funds, and the potential returns. Petitioner was represented at trial by attorneys James Bradford and Anthony Carissi, but he was represented on direct appeal of his conviction by attorneys Richard J. Darko, and Donald Tabbert. On that appeal, petitioner challenged only the sufficiency of the evidence and the admission of certain evidence. The court of appeals rejected both claims. 698 F.2d at 310-313.

2. a. In 1987, four years after his conviction was affirmed on direct appeal, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence. Pet. App. 30-37. In that motion, petitioner raised four new claims: (1) ineffective assistance of trial counsel, (2) prosecutorial misconduct, (3) judicial

misconduct, and (4) failure to present certain defense evidence to the jury. Petitioner's claim of ineffective assistance of counsel included allegations that attorney Bradford was not prepared for trial, failed to investigate the government's case, did not call witnesses to testify, and generally abandoned petitioner's interests. Pet. App. 30-32. In response, the government contended that relief under 28 U.S.C. 2255 was unwarranted because petitioner had not established cause for his failure to raise his claims on direct appeal or substantial prejudice as a result of the alleged errors.

The district court then afforded petitioner an opportunity to file an amended motion addressing the question whether there was cause for his failure to raise the issues on direct appeal of his conviction and substantial prejudice resulting from that failure. Petitioner's response, however, again alleged ineffective assistance only of trial counsel, and did not address the question whether the performance of appellate counsel established cause for his failure to raise the issues on direct appeal. Pet. App. 37-61. After considering petitioner's response, the district court denied relief. Pet. App. 28-29. The court recognized that when a defendant is represented by the same attorney at trial and on appeal, the attorney cannot be expected to argue that his own performance at trial was ineffective. But in this case, the court noted, petitioner had hired new counsel on appeal.[1] The

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[1] The court acknowledged petitioner's assertion that Bradford, petitioner's trial counsel, was at least partially involved in prosecuting the direct appeal, but it was unwilling to assume that the attorneys retained for the appeal abdicated their responsibilities by failing to raise a viable claim of ineffective assistance of trial counsel. Pet. App. 29.

court also pointed out that even if it were to assume that appellate counsel were reluctant to raise the claim of ineffective assistance of trial counsel, that would not provide a basis for failing to raise the other issues that petitioner raised in his Section 2255 motion. Pet. App. 29.[2]

b. The court of appeals affirmed in an unpublished order, holding that petitioner was barred from obtaining relief on any of his four claims under Section 2255 because he had not established cause for his failure to raise those claims on direct appeal. Pet. App. 16-18. The court explained (*id.* at 17):

> [Petitioner] argues that he established cause in the district court by alleging that his trial counsel was ineffective. But as the district court noted, this does not sufficiently explain why [petitioner], who was represented by different counsel on appeal, was precluded from raising these issues on appeal. Unless appellate counsel was similarly ineffective, and [petitioner] does not claim that counsel was, the alleged ineffectiveness of [petitioner's] trial counsel is insufficient to establish cause for [petitioner's] failure to raise these issues on appeal. Cf. United States ex rel. Barnard v. Lane, 819 F.2d 798, 802 (7th Cir. 1987).

3. After the court of appeals ruled, petitioner filed a second motion for relief under Section 2255, this time alleging that his counsel on direct appeal of his conviction were ineffective. On February 20, 1990, the district court denied petitioner's second motion. *United States* v. *Chappell*, No. IP 89-1251-C (S.D.

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[2] The court also observed that petitioner did not assert that the evidence that was not introduced at trial was newly discovered evidence. See Pet. App. 29 n.2.

Ind.). The court held that petitioner had not shown that he was entitled to relief under Section 2255. It explained (slip op. 6):

> This Court is familiar with the trial record in this case, even though Judge Steckler presided over the trial. The trial transcripts, pleadings and appellate opinion have again been examined. Based on that examination, the Court now finds that the failure of [petitioner's] appellate counsel to raise the issues identified in this action on direct appeal did not constitute the ineffectiveness of counsel. This finding is based on the meritlessness of the issues which are now asserted (and which were likewise asserted in the first Section 2255 proceeding), which would plainly not result in a reversal of his conviction.

In addition, the court concluded that petitioner was not entitled to relief on his second Section 2255 motion because he should have raised his claim of ineffective assistance of appellate counsel in his first motion under that Section. Slip op. 4-5; compare *Kuhlmann* v. *Wilson*, 477 U.S. 436, 452-455 (1986) (opinion of Powell, J.).

ARGUMENT

1. Section 2255 is limited to constitutional and jurisdictional claims and to those trial errors that result in a miscarriage of justice. See *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). Section 2255 is not a substitute for a direct appeal. *Id.* at 184; *United States* v. *Frady*, 456 U.S. 152, 165 (1982). Accordingly, if a defendant did not raise a claim at trial or on direct appeal, he cannot prevail on that claim on collateral attack under Section 2255 unless he shows "cause" for the procedural default at both the trial and appellate levels and substantial prejudice

resulting from the error. See *Smith* v. *Murray*, 477 U.S. 527, 533 (1986); *Murray* v. *Carrier*, 477 U.S. 478, 485-486 (1986); *United States* v. *Frady*, 456 U.S. at 167-169. To demonstrate cause, the defendant ordinarily must show that his default was due to a factor external to the defense, such as the novelty of the claim or interference by authorities. But if counsel's failure to raise an objection at trial or to raise an argument on appeal amounted to ineffective assistance of counsel under Sixth Amendment standards, that ineffectiveness itself constitutes cause for a procedural default. *Murray* v. *Carrier*, 477 U.S. at 488. Accordingly, the Court held in *Murray* v. *Carrier* that the defendant had not demonstrated cause for his failure to raise his claim on direct appeal of his conviction because he did not establish an external factor that prevented the claim from being raised and did not show that his attorney's omission on appeal amounted to ineffective assistance of counsel under the standards of *Strickland* v. *Washington*, 466 U.S. 668 (1984). 477 U.S. at 485-492. Accord *Smith* v. *Murray*, 477 U.S. at 533.

Against this background, the courts below correctly concluded that petitioner could not obtain relief under Section 2255 on his claims of prosecutorial misconduct, judicial misconduct, and the omission of certain evidence at trial, because he had not established cause for his failure to raise those claims on direct appeal of his conviction—*e.g.*, by showing that his appellate counsel's failure to raise those issues amounted to constitutionally ineffective assistance under the standards of *Strickland* v. *Washington* and *Evitts* v. *Lucey*, 469 U.S. 387 (1985). In fact, although the district court afforded petitioner an opportunity to supplement his pleadings to show cause

for his failure to raise the issues on direct appeal, petitioner's response to that invitation discussed only the alleged ineffectiveness of his *trial* counsel. See Pet. App. 28-29. Moreover, the district court, in denying petitioner's second Section 2255 motion, has since rejected his contention that appellate counsel rendered ineffective assistance. See page 5, *supra*.

2. a. The fourth claim raised in petitioner's first Section 2255 motion was that petitioner's trial counsel rendered constitutionally ineffective assistance. It has been the position of the United States for some time that claims of ineffective assistance of trial counsel ordinarily should be raised in the first instance in a motion under Section 2255, rather than on direct appeal. See *United States* v. *Cronic*, 466 U.S. 648, 667 n.42 (1984).[3] This is so for two reasons. First, if the same attorney represents the defendant both at trial and on appeal, it is unrealistic to expect the attorney to argue on appeal that his performance at trial was constitutionally defective. Second, the resolution of claims of ineffective assistance of trial counsel often requires consideration of matters that are outside the record on direct appeal and that should be considered by the district court in the first instance. Where claims of ineffective assistance of trial counsel are ordinarily to be raised on collateral attack under Section 2255, a failure to

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[3] In *Cronic*, the United States argued (U.S. Br. at 40-41 n.30; U.S. Reply Br. at 20 n.17) that claims of ineffective assistance of trial counsel should be raised on collateral attack under 28 U.S.C. 2255. The Court did not pass on the merits of that contention as a general matter. It instead concluded that the claim of ineffective assistance of trial counsel was properly presented on appeal in that case because the claim had been raised in a timely motion for a new trial under Fed. R. Crim. P. 33. 466 U.S. at 667 n.42.

raise such a claim on direct appeal would not constitute a procedural default, and the defendant therefore would not have to establish "cause" for that failure in order to present a claim of ineffective assistance of trial counsel in a motion under Section 2255.[4]

A number of courts of appeals, in agreement with our general view and our submission in *Cronic*, have held or expressed a strong preference that a claim of ineffective assistance of trial counsel should ordinarily be raised in a motion under Section 2255, at least where it has not already been addressed by the district court in a motion for a new trial or otherwise. See, *e.g.*, *United States* v. *Costa*, 890 F.2d 480, 482-483 (1st Cir. 1989); *United States* v. *Cruz*, 785 F.2d 399, 404 (2d Cir. 1986); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Sandini*, 888 F.2d 300, 311-312 (3d Cir. 1989); *United States* v. *Akinseye*, 802 F.2d 740, 744 (4th Cir. 1986), cert. denied, 482 U.S. 916 (1987); *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981), cert. denied, 459 U.S. 843 (1982); *United States* v. *Ugalde*, 861 F.2d 802, 804 (5th Cir. 1988), cert. denied, 109 S. Ct. 2447 (1989); *United States* v. *Myers*, 892 F.2d 642, 648-649 (7th Cir. 1990);

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[4] In its brief as appellee in the court of appeals in this case, the government argued that petitioner must show cause for his failure to raise any of his claims on direct appeal. That submission was not consistent with the position of the United States insofar as petitioner's claim of ineffective assistance of trial counsel is concerned. As stated in the text and in our brief in *Cronic*, we believe such claims ordinarily should be raised in a motion under Section 2255. It follows from that position that a defendant should not have to establish cause for his failure to raise the issue on direct appeal.

United States v. *Rewald*, 889 F.2d 836, 859 (9th Cir. 1989); *United States* v. *Casamayor*, 837 F.2d 1509, 1516 (11th Cir. 1988), cert. denied, 109 S. Ct. 813 (1989). In the District of Columbia Circuit, if a claim of ineffective assistance of trial counsel is raised on direct appeal, that court ordinarily will remand the case to the district court for resolution of the claim before disposing of the direct appeal—or, if the defendant has also filed a Section 2255 motion raising an ineffectiveness claim, the court will stay proceedings on the direct appeal pending resolution of the Section 2255 motion. *United States* v. *Cyrus*, 890 F.2d 1245, 1247 (1989).

The approach of the Seventh Circuit, whose decision is at issue here, does not appear to be firmly established. In its unpublished order in this case, the panel concluded that because petitioner was represented by new counsel on direct appeal, he should have raised his claim of ineffective assistance of trial counsel on direct appeal and therefore must now establish cause for failing to do so in order to present that claim in a motion under Section 2255. Pet. App. 17.[5] Another panel of the Seventh Circuit reached a similar conclusion where the defendant likewise had new counsel on appeal. See *Page* v. *United States*, 884 F.2d 300, 301-302 (1989).

It is not clear, however, that the Seventh Circuit is firmly committed to that approach. Subsequent to

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[5] Although petitioner appears to suggest (Pet. 4) that he was represented on appeal by his trial counsel, both courts below concluded that petitioner was, for these purposes, represented by new counsel on appeal. The concurrent determination of that factual issue by both courts below does not warrant further review. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

the decisions in the instant case and in *Page*, another panel of the Seventh Circuit stated that claims of ineffective assistance of trial counsel must ordinarily be raised under 28 U.S.C. 2255. *United States* v. *Myers*, 892 F.2d 642, 648-649 (1990). Because the defendant in *Myers* itself was represented by new counsel on appeal, the panel's statement regarding the preferred means for resolving ineffectiveness claims presumably included such cases. The court in *Myers* nevertheless chose to allow the claim to be considered in the proceedings on direct appeal in that particular case—and to remand for the district court to make factual findings on the claim—because the record on appeal strongly suggested that trial counsel had been ineffective and the panel was reluctant to allow the judgment of conviction to become final until that issue was resolved. See 892 F.2d at 648-649.[6] Thus, in light of the intervening decision in *Myers*, it does not appear that the Seventh Circuit actually adheres to a rule that a claim of ineffective assistance of trial counsel must be raised on direct appeal where the defendant has new counsel, and it therefore is not clear that the Seventh Circuit would (as a corollary to such a rule) continue to apply the cause-and-prejudice standard where new counsel on appeal did not raise a claim of ineffective assistance of trial counsel.

Although we believe that the interests of the criminal justice system support the approach employed by the majority of circuits—to channel claims of

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[6] Compare *United States* v. *Theodoropoulos*, 886 F.2d 587, 598 (3d Cir.), mandamus denied, 109 S. Ct. 1179 (1989) (holding that a claim of ineffective assistance of trial counsel should first be presented in a motion under Section 2255, even where the defendant had new counsel on appeal).

ineffective assistance of trial counsel to proceedings under Section 2255—it would not be unfair for the courts to follow the approach of the Seventh Circuit in this case—namely, to require a defendant who is represented by new counsel on appeal to raise any claim of ineffective assistance of trial counsel on direct appeal, and to apply the cause-and-prejudice standard for excusing a procedural default if the defendant does not do so. Under that approach, the court of appeals would have the option of either addressing the ineffectiveness issue in the proceedings on direct appeal (with a remand to the district court if necessary for further proceedings on the issue) or declining to resolve the issue on direct appeal and remitting the defendant to a motion under Section 2255.

b. The manner in which claims of ineffective assistance of trial counsel should generally be presented does not warrant this Court's review. Although the courts of appeals take somewhat different approaches to this question, they of course agree that such claims can be raised, either on direct appeal or on collateral attack. The courts of appeals also uniformly provide a mechanism whereby claims of ineffective assistance of trial counsel can be heard in a manner that will assure consideration by the district court in the first instance where necessary to allow development of a factual record, either by remanding the claim for consideration by the district court where it is raised for the first time on direct appeal or by declining to entertain the claim without prejudice to raising it in a motion under 28 U.S.C. 2255. And no court of appeals holds that the defendant is barred from raising the claim on collateral attack under 28 U.S.C. 2255 if he was represented by trial counsel on ap-

peal, where it would be unrealistic to expect the claim to be raised on direct review.

Thus, the precise manner in which claims of ineffective assistance of trial counsel are heard is essentially a matter of sound judicial administration within each circuit that may appropriately be left to the respective courts of appeals to refine. Whatever variation there may be among the courts of appeals on subsidiary matters concerning the presentation of such claims does not affect the substantive rights of the defendant or present questions of broad practical significance warranting this Court's attention. In particular, review by this Court of the Seventh Circuit's disposition of petitioner's claim is not warranted, because that court's intervening decision in *Myers* indicates that it has not reached a concluded view on whether a claim of ineffective assistance of trial counsel should ordinarily be raised on direct appeal, even where the defendant is represented by new counsel on appeal. Moreover, a denial of certiorari will not be unfair to petitioner, because the district court has recently passed on petitioner's claims, including his claim of ineffective assistance of trial counsel, and found them to be without merit.[7]

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[7] Petitioner waited five years—from 1982 until 1987—to raise his claim of ineffective assistance of trial counsel in his Section 2255 motion. At this late date, it might prove difficult for petitioner's trial counsel to recall all the circumstances concerning his representation of petitioner. For that reason, petitioner's lengthy delay in bringing his claim furnishes an independent ground for denying petitioner's motion. See *Gunn* v. *Newsome*, 881 F.2d 949, 955 n.4 (11th Cir.), cert. denied, 110 S. Ct. 542 (1989); *United States* v. *Gutierrez*, 839 F.2d 648, 650-652 (10th Cir. 1988). This delay takes on added significance in view of the fact that petitioner retained new counsel to prosecute his direct appeal. If those attorneys be-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
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FEBRUARY 1990

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lieved that trial counsel had rendered ineffective assistance but also believed that such a claim should not be presented on direct appeal, they could have promptly presented that claim by filing a motion on petitioner's behalf under Section 2255.

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No. 89 1040

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

ROBERT S. CHAPPELL,
Petitioner

-V-

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONER IN REPLY TO ARGUMENTS FIRST RAISED IN OPPOSITION BRIEF

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Motion to Waive Rule 33

Comes now the petitioner, pro se to request leave to file the brief, in reply, herewith in its handwritten form for the following reasons:

1. Government's "Brief in Opposition" was received on the afternoon of March 8, 1990, leaving only eight days before the decision date;
2. The petitioner is incarcerated in a small town with only one printer, there is no typing facility in the jail;
3. Phone calls are limited to two per week; thus, calling to solicit help is impossible;
4. Petitioner was transferred in disregard of Rule 41 of The Supreme Court.

This motion is respectfully presented this 9th day of March 1990,

by Robert L. Chappell,
Petitioner, pro se.

Proper service per Rule 28 has been made to the Solicitor General.

by Robert L. Chappell,
Petitioner, pro se.

Comments on Government's Statement

In a fifteen count indictment, four counts were dropped, the petitioner was acquitted on nine counts for which two witnesses were presented and two counts for which no defense was presented, resulted in conviction. There was only one conspiracy or scheme alleged. The petitioner was either guilty of all counts or else none of them.

1. The petitioner has summerized that opinion by the appellate court as being "Orwellian, 1984, Doublespeak." It make no sense at all. Please read it, U.S. v. Chappell, 698 F.2d 308 (7th Cir.). Government statements in this section are inaccurate. Number of oil wells to be drilled was the charge. Zero were drilled. The government stated that the petitioner said that 30 wells would be drilled. There was no time deadline, there were natural gas arrangements to be made and 30 wells were not paid for. There was spacing for 30 wells. The prospectus and transcript are clear on these points.

James Bradford, the trial counsel, was hired to do the appeal. Donald Talbert and Richard Danko were hired to assist. Bradford was paid $15,000.00 and Talbert and Danko were paid a total of $10,000.00. It is simply false to find or to state otherwise.

Comments Continued

It is simply false for anyone to state or for a court to find that petitioner did not say that appellate counsel were ineffective as states on page 3 Govt. Brief. Please see pages 58 (bottom), 59, and 60 of Petitioner's "Petition for Cert.. All of page three is far from truth. Justice in this case would demand a de novo review to alleviate the false findings, half truths and mistatements. It has never been a question of whether or not appellate counsel were ineffective. It has only been a question of who it was. The petitioner says that it was Bradford. Who was it? Was it an association of counsel? Or, was it three separate individuals. Government's brief is too replete with error for comments on all of them.

Comment On Argument

Petitioner is without a law library. He cannot possibly make a legal argument. However, the government argues that the position of the Seventh Circuit is not firm. It has been firm. It was only after petitioner's petition for cert. that it changed or gave that appearance.

Argument for Writ of Certiorari

For all of the reasons stated in Rule 17
1. (a) and (c) the writ should issue:

1. The lower courts have departed too far from the accepted and usual course of judicial proceedings, and the ignorance and total disregard for too many of this courts' decisions not only call for but demand an exercise of this courts power of supervision;

2. Left to a choice of using its current ways or adopting new ones will not remove the autocracy, politics, and severity from that system;

3. Left to a choice the government position will again be ignored as it was prior to petitioners filing;

4. Every dirty trick and more chicanery has been used to prevent petitioner from filing his "Petition for Certiorari." He was transferred to a small town with only one printer in total disregard for Supreme Court Rule 41.

5. The Seventh Circuit made decisions complying with this courts decisions only after petitioners filing;

6. Haynes v. Kerner, 92 S. Ct. 594 (1972) has been totally ignored. The cover up is desperately continuing. For the district court to make findings without evidence, without briefs in total disregard of the Supreme Courts' rulings proves the necessity for the court to exercise its supervisory powers;

7. It has been impossible for petitioner to get exhibits and even the transcripts from his lawyers (former ones). They refuse and lie about it;

8. The findings of the lower courts have been false, half-truths which are unrelated to any fact. This is true from the direct appeal all the way through the present; an example is to be found in Petition for Cert. pages 58, 59, and 60. In spite of all of that argument on ineffective appellate counsel, the district court and the appellate court found that petitioner had not alleged ineffective assistance of appellate counsel. It was not listed on question 9 but it was stated in the court ordered brief;

9. The petitioner came straight through the wide-open "front door." Please see Petitioner's Petition for Cert., page 29, lines 8 thru 12 - "In the absence of some showing to the contrary by the petitioner, etc.."

10. The petitioner's second habeas petition was acted upon in 85 days while it took 17 months for the first petition;

11. To conclude that petitioner's claims are without merit is just plain false. If they are without merit none will ever have it in that district;

12. Why was the first petition passed from Democrat to Republican and back and forth if they were without merit;

13. The first petition took 17 months while the second only took 85 days; more chicanery.

Indiana should be told that federal district courts are not private property for political playgrounds or political workshops for campaign financing. Would it hear the Supreme Court? It hasn't.

Plain Error

In other districts it is plain error for a prosecutor to pretend that he has private knowledge that the petitioner lied and that he committed another crime. In cross examination Duncan held open the divorce transcript and said, "You attempted to defraud your ex-wife in the divorce settlement." That had never been alleged by anyone. The transcript did not indicate that either. In closing argument he held up the transcript and stated, "He tried to defraud his ex-wife in the divorce settlement. He lied about that." There was not one shred of evidence to that effect; there was no objection and no curative instruction. That's plain error in the Fifth Circuit, but not in the Seventh, United States v. Dunnin (1980, CA5) 632 F.2d 1297. Bradford just sat there staring and grinning at the judge as petitioner frantically tried to get him to object.

Prosecutor Turner's statement "if you can't convict him on the earlier counts, you can convict him on the latter ones also approaches plain error."

Conclusion

Petitioner had a fine reputation. He had built excellent companies. There was never a complaint. Press was saying petitioner was a financial genius. Petitioner was ordered to pay $250,000, to Vance Hartke campaign manager or else have problems with the I.R.S. and S.E.C. Petitioner said no. It was wrong to do that and he went to the newspapers. Hartke's promises were well kept. Petitioner, at age 39, was the first recipient of an injunction in the United States without the consideration of materiality, reliance, or intent. That effectively ended the business career in any normal sense. It was a life sentence. After two trials lasting seven weeks the frivilous charges were all proved to be false. The most serious fact was some typos in the minute book. There was not even the slightest rule violation.

The "pretended crimes" and "pretended tax debt" will continue unless the Supreme Court acts.

The deviation from normal procedure is too great on the issues in this case. The writ should issue for all of the above reasons and with the hope that benefit would come to those who live in Indiana. Their economy is dependent upon an honest efficient judiciary.

Respectfully submitted, 3-9-90.
Robert S. Chapple, Petitioner, Pro se.